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UNITED STATES REPORTS

VOLUME 212

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1908

CHARLES HENRY BUTLER

REPORTER

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1909

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JUSTICES

OF THE

SUPREME COURT[1]

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
WILLIAM HENRY MOODY, Associate Justice.

CHARLES J. BONAPARTE, Attorney General.
HENRY MARTYN HOYT, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

[1] For allotment of the Chief Justice and Associate Justices among the several circuits see next page.

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SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, DECEMBER 24, 1906.[1]

ORDER: There having been an Associate Justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.
For the Second Circuit, Rufus W. Peckham, Associate Justice.
For the Third Circuit, William H. Moody, Associate Justice.
For the Fourth Circuit, Melville W. Fuller, Chief Justice.
For the Fifth Circuit, Edward D. White, Associate Justice.
For the Sixth Circuit, John M. Harlan, Associate Justice.
For the Seventh Circuit, William R. Day, Associate Justice.
For the Eighth Circuit, David J. Brewer, Associate Justice.
For the Ninth Circuit, Joseph McKenna, Associate Justice.

[1] For the last preceding allotment see 202 U. S. vii.

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TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

PAGE

Abbott, Trustee, Scott *v.* 571
Abrams *v.* White 558
Adams Express Company *v.* United States 522
Ainsworth *v.* Evans 584
Akron Savings Bank, American Surety Co. *v.* . . . 557
Alabama National Bank of Birmingham *v.* Massasoit-Pocasset National Bank of Fall River, Mass. . . . 572
Alton Water Company, Lewis *v.* 581
American Bridge Company, Schneider *v.* 587
American Dredging Company, McCaulley *v.* 573
American Express Company *v.* Mullins 311
American Express Company *v.* United States . . . 522
American Felt Company *v.* Scollard, Collector of Taxes of Boston 584
American Surety Co. *v.* Akron Savings Bank 557
Anderson, Standard Oil Company *v.* 215
Arkansas, Hammond Packing Company *v.* 322
A. S. Watson & Co., Limited, Enriquez, Admr., etc., *v.* 557
Atkins & Company *v.* Moore, Commissioner of Patents 285
Atlantic Trust and Deposit Company *v.* Town of Laurinburg, N. C. 573
Attorney General of the State of New York *v.* Consolidated Gas Company 19
Auchincloss *v.* Constantine & Pickering Steamship Company 573
Auchincloss *v.* McLean 573

Babcock *v.* DeMott 582

Digitized by Google

TABLE OF CONTENTS.

Table of Cases Reported.

PAGE

Bagley *v.* General Fire Extinguisher Company . . 477
Baltimore Refrigerating & Heating Company *v.* Wetzel 577
Bank (Akron Sav.), American Surety Company *v.* . . 557
Bank (Ala. Nat.) *v.* Massasoit-Pocasset National Bank of Fall River, Mass. 572
Bank (Boatmen's), Fritzlen *v.* 364
Bank (First Nat. of Lexington) *v.* Hagar, Auditor of Public Accounts 585
Bank (First Nat. of Suffield), Converse *v.* 567
Bank (Massasoit-Pocasset Nat.), Alabama National Bank of Birmingham *v.* 572
Bank (Union Stockyards), Schlegel *v.* 573
Bean *v.* Morris 582
Berry Bros., Limited, *v.* Steamship St. Quentin . . 574
Bilik *v.* Strassheim, Sheriff of Cook County, Illinois . 551
Boatmen's Bank, Fritzlen *v.* 364
Bourman, Texas and Pacific Railway Company *v.* . 536
Bradford *v.* Morrison 389
Brown, Notley *v.* 570
Brown, Spreckels *v.* 208
Bryan *v.* Ker 575
Buckley, Matter of 584
Bunker Hill & Sullivan Mining & Concentrating Company, McCarthy *v.* 583
Burn Line, Ltd., *v.* United States and Australasia Steamship Company 580
Butler Bros. Shoe Company *v.* United States Rubber Company 577

Canal Company (Ches. & Del.), Gring *v.* 571
Canal Zone Government, Coulson *v.* 553
Cariño *v.* The Insular Government of the Philippine Islands 449
Carpenter *v.* Winn 582
Casanovas, Hord, Collector of Internal Revenue, *v.* . 587
Cascaden, Dunbar *v.* 572

Digitized by Google

Table of Cases Reported.

PAGE

Celis *v.* United States 586
Central Hudson Steamboat Company, Claimant, Phœnix Construction Company *v.* 558
Central Stock Yards Company, Louisville and Nashville Railroad Company *v.* 132
Chamberlin, United States *v.* 575
Chaney, Clevenger, Trustee in Bankruptcy, *v.* . . . 562
"Charles E. Matthews," The, Henry Dubois Sons Company *et al.* *v.* 466
Chatfield, Montgomery *v.* 580
Cherokee Nation (United States and) *v.* Hemphill and Murchison 552
Chesapeake & Delaware Canal Company, Gring *v.* . 571
Chesapeake & Ohio Railway Company, Matter of . . 554
Chicago & Alton Railway Company *v.* United States . 563
Chicago, Burlington & Quincy Railway Company *v.* Willard 578
Chicago, Rock Island and Pacific Railway Company, Stepp *v.* 588
Chicago, St. Paul, Minneapolis & Omaha Ry. Co. *v.* United States 579
Cincinnati, Devou *v.* 577
City of Cincinnati, Devou *v.* 577
City of Clay Center, Clay Center Electric Light & Power Company *v* 564
City of Hutchinson, Kansas, Water, Light & Gas Company *v.* 555
City of Knoxville *v.* Knoxville Water Company . . 1
City of Louisville, Kentucky, Cumberland Telephone & Telegraph Company *v.* 588
City of Natchez, Thornton *v.* 559
City of New York *v.* Consolidated Gas Company of New York 19
City of Tyler, Texas, St. Louis Southwestern Railway Company *v.* 552
Clay Center, Clay Center Electric Light & Power Co. *v.* 564

Digitized by Google

Table of Cases Reported.

PAGE

Clay Center Electric Light & Power Co. *v.* City of Clay Center 564
Clevenger, Trustee in Bankruptcy, *v.* Chaney . . 562
Clevenger, Trustee in Bankruptcy, *v.* Lyle . . . 562
Clevenger, Trustee in Bankruptcy, *v.* Nichols . . 562
Clough *v.* Grand Trunk Western Railway Company . 579
Coate, Greenameyer *v.* 434
Collector of Taxes of Boston, American Felt Company *v.* 584
Collins, Pittsburg, Cincinnati, Chicago & St. Louis Railway Company *v.* 560
Colorado Smelting & Mining Company, Western Loan & Savings Company *v.* 556
Commissioner of Patents, E. C. Atkins & Company *v.* . 285
Consolidated Gas Company, City of New York *v.* . . 19
Consolidated Gas Company, Jackson, Attorney General of the State of New York, *v.* 19
Consolidated Gas Company, Willcox *et al.*, Constituting the Public Service Commission of New York, *v.* . 19
Consolidated Rubber Tire Company, Diamond Rubber Company *v.* 574
Constantine & Pickering Steamship Company, Auchincloss *v.* 573
Continental Wall Paper Company *v.* Louis Voight and Sons Company 227
Converse *v.* First National Bank of Suffield . . . 567
Converse *v.* Minnesota Thresher Mfg. Co. . . . 567
Coulson *v.* Government of Canal Zone 553
Coulson, Matter of 553
Crawford *v.* United States 183
Crozier *v.* Fried Krupp Aktiengesellschaft 582
Cumberland Telephone & Telegraph Company *v.* City of Louisville, Kentucky 588
Cumberland Telephone and Telegraph Company, Railroad Commission of Louisiana *v.* 414
Cunningham, Swenson *v.* 571

Digitized by Google

Table of Cases Reported.

PAGE
Davenport, Winnisimmet Company *v.* 576
Delaware Seamless Tube Company *v.* Shelby Steel Tube Company 580
Delk *v.* St. Louis & San Francisco Railroad Company . 578
DeMott, Babcock *v.* 582
Deselms, Waters-Pierce Oil Company *v.* 159
Devou *v.* City of Cincinnati 577
Diamond Rubber Company of New York *v.* Consolidated Rubber Tire Company 574
Dowagiac Manufacturing Company, *In re,* 569
Dr. Miles Medical Company *v.* John D. Park & Sons Company 575
Dubois Sons Company *et al.* *v.* Steam Tug "Charles E. Matthews" 466
Dunbar *v.* Cascaden 572
Dunlop, Mercer *v.* 588
Dunn, Matter of 374

E. C. Atkins & Company *v.* Moore, Commissioner of Patents 285
Eckhardt, Receiver of the Waters-Pierce Oil Company (State of Texas and), Palmer *v.* 118
Enders *v.* Friday, as Mayor of the City of Norfolk, Neb. 584
Enriquez, Admr., etc., *v.* A. S. Watson & Co., Limited . 557
"Eugene F. Moran," The, *v.* New York Central and Hudson River Railroad Company *et al.* 466
Evans, Ainsworth *v.* 584
Expanded Metal Company, General Fireproofing Company *v.* 577
Ex parte Patrick 555
Express Company (Am.) *v.* Mullins 311
Express Companies *v.* United States 522

Faithorn *v.* United States 563
Ferguson-McKinney Dry Goods Company, J. A. Scriven Company *v.* 582

Digitized by Google

Table of Cases Reported.

PAGE

First National Bank of Lexington *v.* Hagar, Auditor of Public Accounts 585
First National Bank of Suffield, Converse *v.* . . . 567
Folmina, The 354
Frederic L. Grant Shoe Company *v.* W. M. Laird Company 445
Freshman *v.* United States 566
Friday, as Mayor of the City of Norfolk, Neb., Enders *v.* 584
Fried Krupp Aktiengesellschaft, Crozier *v.* 582
Fritzlen *v.* Boatmen's Bank 364
Fulton, Shackelford *v.* 581

Gaines *v.* Knecht 561
Gains & Co. *v.* Kahn 572
Garfield, Secretary, etc., *v.* United States *ex rel.* Rice . 589
Garfield, Secretary, etc., *v.* United States *ex rel.* Spalding 583
Garfield, Secretary, etc., *v.* United States *ex rel.* Vaughan 589
Gas Company (Consolidated), City of New York *v.* . . 19
Gas Company (Consolidated), Jackson, Attorney General of the State of New York, *v.* 19
Gas Company (Consolidated), Willcox *et al.*, Constituting the Public Service Commission of New York, *v.* . 19
General Fire Extinguisher Company, Bagley *v.* . . . 477
General Fireproofing Company *v.* Expanded Metal Company 577
Goon Shung, *alias* Ng Shung, *v.* United States . . 566
Government of Canal Zone, Coulson *v.* 553
Graham *v.* Oregon Railroad & Nav gation Company . 570
Grand Trunk Western Railway Company, Clough *v.* . 579
Grant Shoe Company *v.* Laird Company 445
Greenameyer *v.* Coate 434
Gresham *v.* Huntington 577
Gring *v.* Chesapeake & Delaware Canal Company . . 571

Hagar, Auditor of Public Accounts, First National Bank of Lexington *v.* 585
Hammond Packing Company *v.* State of Arkansas . 322

Digitized by Google

Table of Cases Reported.

PAGE

Hardrat, Matter of 554
Harten *v.* Löffler 397
Hartman *v.* John D. Park & Sons Company 588
Healy *v.* Sun Company 583
Hein, Westinghouse *v.* 576
Hemphill and Murchison *v.* United States and the Cherokee Nation 586
Hemphill and Murchison, United States and the Cherokee Nation *v.* 552
Henry Dubois Sons Company and the Steam Tug "Eugene F. Moran," Michael Moran, Claimant, *v.* The Steam Tug "Charles E. Matthews," John D. Daily *et al.*, Claimants, ... 466
Holy Roman Catholic and Apostolic Church, Parish of Tambobong, Santos *v.* 463
Hopkins, United States Marshal, Toy Toy *v.* . . . 542
Hord, Collector of Internal Revenue, *v.* Casanovas . . 587
Huntington, Gresham *v.* 577
Hutchinson, Kansas, Water, Light & Gas Company *v.* . . 555

In re Dowagiac Manufacturing Company 569
In re Jones 561
Insular Government of the Philippine Islands, Cariño *v.* 449
Insurance Company (Williamsburgh) *v.* Willard . . . 581

Jackson, Attorney General of the State of New York, *v.* Consolidated Gas Company 19
Jahn *v.* Steamship Folmina. See The Folmina . . 354
J. A. Scriven Company *v.* Rice-Stix Dry Goods Company 582
J. A. Scriven Company *v.* Premium Manufacturing Company 582
J. A. Scriven Company *v.* Ferguson-McKinney Dry Goods Company 582
John D. Park & Sons Company, Dr. Miles Medical Company *v.* 575
John D. Park & Sons Company, Hartman *v.* 588

Digitized by Google

Table of Cases Reported.

PAGE
Johnson *v.* Mueser 283
Johnston *v.* Sexton 576
Jones, *In re* 561
Jones *v.* United States 576
Jose Maria Ubarri e Yramategui *v.* Pablo Ubarri e Yramategui 587
J. S. Young Company *v.* United States 585
Juragua Iron Company, Limited, *v.* United States . . 297

Kahn, W. A. Gains & Co. *v.* 572
Ker, Bryan *v.* 575
Klumpp *v.* Thomas 579
Knecht, Gaines *v.* 561
Knoxville *v.* Knoxville Water Company 1
Knoxville Water Company, City of Knoxville *v.* . . . 1
Komada & Co. *v.* United States 578
Krupp Aktiengesellschaft, Crozier *v.* 582

Laird Company, Frederick L. Grant Shoe Company *v.* . 445
Laurel Oil and Gas Company *v.* Morrison 291
Laurinburg, Town of, Atlantic Trust and Deposit Company *v.* 573
Leano *v.* United States 589
Lewis *v.* Alton Water Company 581
Lightheiser, Pittsburg, Cincinnati, Chicago & St. Louis Railway Company *v.* 560
Löffler, Harten *v.* 397
Looney *v.* State of Missouri 585
Louisiana Railroad Commission *v.* Cumberland Telephone and Telegraph Company 414
Louisville, Kentucky, Cumberland Telephone & Telegraph Company *v.* 588
Louisville and Nashville Railroad Company *v.* Central Stockyards Company 132
Louis Voight and Sons Company, Continental Wall Paper Company *v.* 227
Lyle, Clevenger, Trustee in Bankruptcy, *v.* 562

Digitized by Google

Table of Cases Reported.

PAGE
MacAndrews and Forbes Company *v.* United States . 585
McCarthy *v.* Bunker Hill & Sullivan Mining & Concentrating Company 583
McCaulley *v.* American Dredging Company . . . 573
McDaniel *v.* Traylor 428
McLean, Auchincloss *v.* 573
Madson, Spokane Valley Land & Water Company *v.* . 565
Magon *v.* United States 589
Marrs, Treadwell *v.* 586
Marvin, United States *v.* 275
Massasoit-Pocasset National Bank of Fall River, Mass., Alabama National Bank of Birmingham *v.* . . . 572
Matter of Buckley 584
Matter of Chesapeake & Ohio Railway Company . . 554
Matter of Coulson 553
Matter of Dunn 374
Matter of Hardrat 554
Matthews, The, Henry Dubois Sons Company *v.* . . 466
Mayor of City of Norfolk, Neb., Enders *v.* 584
Mercer *v.* Dunlop 588
Mercer *v.* Monitor Drill Company 590
Meriwether *v.* Wood 586
Miles Medical Company *v.* John D. Park & Sons Company 575
Mining Company (Bunker Hill, etc.), McCarthy *v.* . 583
Mining Company (Colorado, etc.), Western Loan & Savings Company *v.* 556
Minnesota Thresher Mfg. Co., Converse *v.* 567
Missouri, Looney *v.* 585
Monitor Drill Company, Mercer *v.* 590
Montgomery *v.* Chatfield 580
Moore, Commissioner of Patents, E. C. Atkins & Company *v.* 285
Moran, The, *v.* New York Central and Hudson River Railroad Company 466
Morris, Bean *v.* 582

Digitized by Google

Table of Cases Reported.

PAGE
Morrison, Bradford *v.* 389
Morrison, Laurel Oil and Gas Company *v.* 291
Mountain Copper Company, United States *v.* . . . 587
Moyer *v.* Peabody 78
Mueser, Johnson *v.* 283
Mullan *v.* United States 516
Mullins, American Express Company *v.* 311
Munich, Valdes *v.* 568
Murray *v.* Wilson Distilling Company 578

Natchez, Thornton *v.* 559
National Bank (Ala.) *v.* Massasoit-Pocasset National Bank of Fall River, Mass. 572
National Bank (First), Converse *v.* 567
National Bank (First, of Lexington) *v.* Hagar, Auditor of Public Accounts 585
National Bank (Massasoit-Pocasset), Alabama Nat. Bank of Birmingham *v.* 572
National Express Company *v.* United States 522
New York *v.* Consolidated Gas Company 19
New York Central and Hudson River Railroad Company *et al.*, Steam Tug "Eugene F. Moran" *et al. v.* . 466
New York Central and Hudson River Railroad Company *v.* United States 481, 500
New York Central and Hudson River Railroad Company, United States *v.* 509
New York Public Service Commission *v.* Consolidated Gas Company 19
Nichols, Clevenger, Trustee in Bankruptcy, *v.* . . . 562
Nicomen Boom Company, North Shore Boom and Driving Company *v.* 406
Nielsen *v.* State of Oregon 315
Noel-Young Bond & Stock Company, Presidio County, Texas, *v.* 58
North Shore Boom and Driving Company *v.* Nicomen Boom Company 406

Digitized by Google

Table of Cases Reported.

PAGE

Notley *v.* Brown 570

Oil Company (Laurel) *v.* Morrison 291
Oil Company (Standard) *v.* Anderson 215
Oil Company (Standard) *v.* United States 579
Oil Company (Waters-Pierce) *v.* Deselms 159
Oil Company (Waters-Pierce) *v.* Texas (No. 1) . . . 86
Oil Company (Waters-Pierce) *v.* Texas (No. 2) . . . 112
Ontario Land Company *v.* Yordy 152
Oregon, Nielsen *v.* 315
Oregon, Shorey *v.* 585
Oregon Railroad & Navigation Company, Graham *v.* . . 570

Pablo Ubarri e Yramategui, Jose Maria Ubarri e Yramategui *v.* 587
Palmer *v.* State of Texas and Eckhardt, Receiver of the Waters-Pierce Oil Company 118
Park & Sons Company, Dr. Miles Medical Company *v.* . 575
Park & Sons Company, Hartman *v.* 588
Patrick, *Ex parte* 555
Peabody, Moyer *v.* 78
Pennsylvania Railroad Company, Zeiger *v.* . . . 575
Perianes, Valdes *v.* 568
Philippine Islands, Cariño *v.* 449
Phœnix Construction Company *v.* The Steamer "Poughkeepsie," etc., and the Steamer "Homer Ramsdell," etc., Central Hudson Steamboat Company, Claimant 558
Pittsburg, Cincinnati, Chicago & St. Louis Railway Company *v.* Collins 560
Pittsburg, Cincinnati, Chicago & St. Louis Railway Company *v.* Lightheiser 560
Pittsburg, Cincinnati, Chicago & St. Louis Railway Company *v.* Ross 560
Powell, United States *v.* 564
Premium Manufacturing Company, J. A. Scriven Company *v.* 582

Digitized by Google

Table of Cases Reported.

PAGE

Presidio County, Texas, *v.* The Noel-Young Bond & Stock Company 58
Public Service Commission of New York *v.* Consolidated Gas Company 19
Queen Anne's Railroad Company, Scott *v.* 574
Railroad Commission of Louisiana *v.* Cumberland Telephone and Telegraph Company 414
Railroad Company (L. & N.) *v.* Central Stock Yards Company 132
Railroad Company (N. Y. Cent. & H. R.), Steam Tug "Eugene F. Moran" *v.* 466
Railroad Company (N. Y. Cent. & H. R.) *v.* United States 481, 500
Railroad Company (N. Y. Cent. & H. R.), United States *v.* 509
Railroad Company (Penna.), Zeiger *v.* 575
Railroad Company (Queen Anne's), Scott *v.* . . . 574
Railroad Company (St. L. & S. F.), Delk *v.* 578
Railroad & Navigation Company (Ore.), Graham *v.* . 570
Railway Company (Chi. & Alt.) *v.* United States . . 563
Railway Company (C., B. & Q.) *v.* Willard 578
Railway Company (C. & O.), Matter of 554
Railway Company (C., R. I. & Pac.), Stepp *v.* . . . 588
Railway Company (C., St. P., M. & O.) *v.* United States 579
Railway Company (Gr. Trunk West.), Clough *v.* . . . 579
Railway Company (Pittsburg, C., C. & St. L.) *v.* Collins 560
Railway Company (Pittsburg, C., C. & St. L.) *v.* Lightheiser 560
Railway Company (Pittsburg, C. C., & St. L.) *v.* Ross . 560
Railway Company (St. L. S. W.) *v.* City of Tyler . . 552
Railway Company (Southern) *v.* Townsend 571
Railway Company (Tex. & Pac.) *v.* Bourman . . . 536
Rainy Lake River Boom Corporation *v.* Rainy River Lumber Company, Limited 574
Rainy River Lumber Company, Limited, Rainy Lake River Boom Corporation *v.* 574

Digitized by Google

Table of Cases Reported.

PAGE
Rakes *v.* United States 55
Receiver of the Waters-Pierce Oil Company (State of Texas and), Palmer *v.* 118
Rice, Garfield, Secretary of the Interior, *v.* 589
Rice-Stix Dry Goods Company, J. A. Scriven Company *v.* 582
Roman Catholic Church, Santos *v.* 463
Ross, Pittsburg, Cincinnati, Chicago & St. Louis Railway Company *v.* 560

Santos *v.* Holy Roman Catholic and Apostolic Church, Parish of Tambobong 463
Schlegel *v.* Union Stockyards Bank of Buffalo . . 573
Schneider *v.* American Bridge Company . . . 587
Schodde *v.* Twin Falls Land & Water Company . . 581
Scollard, Collector of Taxes of Boston, American Felt Company *v.* 584
Scott *v.* Abbott, Trustee 571
Scott *v.* Queen Anne's Railroad Company . . . 574
Scriven Company *v.* Ferguson-McKinney Dry Goods Company 582
Scriven Company *v.* Premium Manufacturing Company 582
Scriven Company *v.* Rice-Stix Dry Goods Company . 582
Secretary of the Interior *v.* Spalding 583
Secretary of the Interior *v.* United States *ex rel.* Rice . 589
Secretary of the Interior *v.* United States *ex rel.* Vaughan 589
Sexton, Johnston *v.* 576
Shackelford *v.* Fulton 581
Shaw *v.* United States 559
Shelby Steel Tube Company, Delaware Seamless Tube Company *v.* 580
Shepard *v.* United States 571
Sheridan-Kirk Contract Company *v.* United States . 587
Shorey *v.* State of Oregon 585
Southern Railway Company *v.* Townsend 571
Spalding, Garfield, Secretary, etc., *v.* 583
Spokane Valley Land & Water Company *v.* Madson . 565

Digitized by Google

Table of Cases Reported.

PAGE

Spreckels *v.* Brown 208
St. Louis & San Francisco Railroad Company, Delk *v.* 578
St. Louis Southwestern Railway Company *v.* City of Tyler, Texas 552
St. Quentin, The, Berry Bros., Limited, *v.* 574
Standard Oil Company *v.* Anderson 215
Standard Oil Company of Indiana, United States *v.* . . 579
State of Arkansas, Hammond Packing Company *v.* . . 322
State of Missouri, Looney *v.* 585
State of Oregon, Nielsen *v.* 315
State of Oregon, Shorey *v.* 585
State of Texas, Thomas *v.* 278
State of Texas, Waters-Pierce Oil Company (No. 1) *v.* . . 86
State of Texas, Waters-Pierce Oil Company (No. 2) *v.* . . 112
State of Texas and Eckhardt, Receiver of the Waters-Pierce Oil Company, Palmer *v.* 118
Steamer "Poughkeepsie," etc., and the Steamer "Homer Ramsdell," etc., Central Hudson Steamboat Company, Claimant, The Phœnix Construction Company *v.* 558
Steamship Folmina, Jahn *v.* See The Folmina . . . 354
Steamship St. Quentin, Berry Bros., Limited, *v.* . . . 574
Steam Tug "Charles E. Matthews," The Henry Dubois Sons Company *et al.* *v.* 466
Steam Tug "Eugene F. Moran," Michael Moran, Claimant, and the Scows "15 D" and "18 D," The Henry Dubois Sons Co., Claimant, *v.* The New York Central and Hudson River Railroad Company and the Steam Tug "Charles D. Matthews," John D. Daily *et al.*, Claimants 466
Stephenson, United States *v.* 572
Stepp *v.* Chicago, Rock Island and Pacific Railway Company 588
Strassheim, Sheriff of Cook County, Illinois, Bilik *v.* . . 551
Sun Company, Healy *v* 583

Digitized by Google

Table of Cases Reported.

PAGE

Swenson *v.* Cunningham 571

Telephone Company (Cumberland) *v.* City of Louisville, Kentucky 588
Telephone Company (Cumberland), Railroad Commission of Louisiana *v.* 414
Texas, Thomas *v.* 278
Texas, Waters-Pierce Oil Company *v.* (No. 1) . . 86
Texas, Waters-Pierce Oil Company *v.* (No. 2) . . 112
Texas and Eckhardt, Receiver of the Waters-Pierce Oil Company, Palmer *v.* 118
Texas and Pacific Railway Company *v.* Bourman . . 536
The Folmina, ... 354
Thomas, Klumpp *v.* 579
Thomas *v.* State of Texas 278
Thornton *v.* City of Natchez 559
Town of Laurinburg, N. C., Atlantic Trust and Deposit Company *v.* 573
Townsend, Southern Railway Company *v.* 571
Toy Toy *v.* Hopkins, United States Marshal . . . 542
Traylor, McDaniel *v.* 428
Treadwell *v.* Marrs 586
Trust Company (Atl.) *v.* Town of Laurinburg, N. C. . 573
Tug "Charles E. Matthews," The Henry Dubois Sons Company *et al. v.* 466
Tug "Eugene F. Moran" *et al. v.* New York Central and Hudson River Railroad Company *et al.* 466
Twin Falls Land & Water Company, Schodde *v.* . . 581
Tyler (City of), St. Louis Southwestern Railway Company *v.* 552

Ubarri e Yramategui *v.* Ubarri e Yramategui . . 587
Union Stockyards Bank of Buffalo, Schlegel *v.* . . 573
United States, Adams Express Company *v.* . . . 522
United States, American Express Company *v.* . . 522
United States, Celis *v.* 586
United States *v.* Chamberlin 575

Digitized by Google

Table of Cases Reported.

PAGE
United States, Chicago & Alton Railway Company *v.* . 563
United States, Chicago, St. Paul, Minneapolis & Omaha Ry. Co. *v.* 579
United States, Crawford *v.* 183
United States, Faithorn *v.* 563
United States, Freshman *v.* 566
United States, Goon Shung *v.* 566
United States, Jones *v.* 576
United States, J. S. Young Company *v.* 585
United States, Juragua Iron Company, Limited, *v.* . 297
United States, Komada & Co. *v.* 578
United States, Leano *v.* 589
United States, MacAndrews and Forbes Company *v.* . 585
United States, Magon *v.* 589
United States *v.* Marvin 275
United States *v.* Mountain Copper Company . . . 587
United States, Mullan *v.* 516
United States, National Express Company *v.* . . . 522
United States *v.* New York Central and Hudson River Railroad Company 509
United States, New York Central and Hudson River Railroad Company *v.* 481, 500
United States *v.* Powell 564
United States, Rakes *v.* 55
United States, Shaw *v.* 559
United States, Shepard *v.* 571
United States, Sheridan-Kirk Contract Company . . 587
United States *v.* Standard Oil Company of Indiana . 579
United States *v.* Stephenson 572
United States, United States Express Company *v.* . . 522
United States, Wann *v.* 563
United States, Wells, Fargo and Company *v.* . . . 522
United States and Australasia Steamship Company, Burn Line, Ltd., *v.* 580
United States and the Cherokee Nation *v.* Hemphill and Murchison 552

Digitized by Google

Table of Cases Reported.

PAGE

United States and the Cherokee Nation, Hemphill and Murchison *v.* 586
United States *ex rel.* Rice, Garfield, Secretary of the Interior, *v.* 589
United States *ex rel.* Spalding, Garfield, Secretary, etc., *v.* 583
United States *ex rel.* Vaughan, Garfield, Secretary of the Interior, *v.* 589
United States Express Company *v.* United States . . 522
United States Rubber Company, Butler Bros. Shoe Company *v.* 577

Valdes *v.* Munich 568
Valdes *v.* Perianes 568
Valdes *v.* Wood 568
Vaughan, Garfield, Secretary of the Interior, *v.* . . . 589
Voight and Sons Company, Continental Wall Paper Company *v.* 227

W. A. Gains & Co. *v.* Kahn 572
Wann *v.* United States 563
Water Company, City of Knoxville *v.* 1
Water, Light & Gas Company *v.* City of Hutchinson, Kansas 555
Waters-Pierce Oil Company *v.* Deselms 159
Waters-Pierce Oil Company (Eckhardt, Receiver), Palmer *v.* 118
Waters-Pierce Oil Company *v.* State of Texas (No. 1) . 86
Waters-Pierce Oil Company *v.* State of Texas (No. 2) . 112
Watson & Co., Enriquez, Admr., etc., *v.* 557
Wells, Fargo and Company *v.* United States . . . 522
Western Loan & Savings Company *v.* Colorado Smelting & Mining Company 556
Westinghouse *v.* Hein 576
Wetzel, Baltimore Refrigerating & Heating Company *v.* 577
White, Abrams *v.* 558
Willard, Chicago, Burlington & Quincy Railway Company *v.* 578

Digitized by Google

Table of Cases Reported.

PAGE

Willard, Williamsburgh City Fire Insurance Company *v.* 581
Willcox *et al.* Constituting the Public Service Commission of New York, *v.* Consolidated Gas Company . . 19
Williamsburgh City Fire Insurance Company *v.* Willard 581
Wilson Distilling Company, Murray *v.* 578
Winn, Carpenter *v.* 582
Winnisimmet Company *v.* Davenport 576
W. M. Laird Company, Frederic L. Grant Shoe Company *v* 445
Wood, Meriwether *v.* 586
Wood, Valdes *v.* 568

Yordy, Ontario Land Company *v.* 152
Young Company *v.* United States 585
Yramategui *v.* Yramategui 587

Zeiger *v.* Pennsylvania Railroad Company . . . 575

Digitized by Google

TABLE OF CASES

CITED IN OPINIONS.

PAGE

Adams *v.* New York, 192 U. S. 585 566
Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211 110, 266
Alabama, The, and The Gamecock, 92 U. S. 695 474
Alabama Great Southern Ry. *v.* Thompson, 200 U. S. 206 384
Alaska Mining Co. *v.* Whelan, 168 U. S. 86 541
Allen *v.* Ashley School Fund, 102 Mass. 262 211
Allen *v.* Georgia, 166 U. S. 138 107
Allen *v.* Holton, 20 Pick. 458 211
Allen *v.* Peterson, 38 Wash. 599 158
Allen *v.* Southern Pac. R. R. Co., 173 U. S. 479 447
American Express Co. *v.* Iowa, 196 U. S. 133 314
American Smelting Co. *v.* Colorado, 204 U. S. 103 344
American Sugar Refining Co. *v.* New Orleans, 181 U. S. 277 479
American Sugar Ref. Co. *v.* United States, 211 U. S. 155 560
Anderson *v.* Boyer, 156 N. Y. 93 225
Anderson County Commissioners *v.* Beal, 113 U. S. 227 65
Anonymous, 12 Mod. 559 492
Arbouin *v.* Anderson, 1 Adolph. & El. N. R. 498 71
Armour Packing Co. *v.* United States, 209 U. S. 56 495, 497, 531
Ash *v.* Cummings, 50 N. H. 591 144
Atlantic Coast Line *v.* North Carolina Commission, 206 U. S. 1 54
Atlas, The, 93 U. S. 302 474, 476
Atocha, *Ex parte*, 17 Wall. 439 553
Bacon *v.* Walker, 204 U. S. 311 150
Bagley *v.* General Fire Extinguisher Co., 150 Fed. Rep. 284 478
Ball *v.* Presidio County, 27 S. W. Rep. 702 66, 71
Ball, Hutchins & Co. *v.* Presidio County, 88 Tex. 60 72, 73
Baltimore & Ohio R. R. Baugh, 149 U. S. 368 541
Balto. & Ohio S. W. Ry. Co. *v.* Then, 159 Ill. 535 182
Barlin *v.* Ramariz, 7 Phil. Rep. 41 465
Barnet *v.* National Bank, 98 U. S. 555 273
Barnstable, The, 181 U. S. 464 474
Barrington *v.* Missouri, 205 U. S. 483 281
Beals *v.* Cone, 188 U. S. 184 559
Bearse *v.* Ropes, 1 Sprague, 331 363
Belk *v.* Meagher, 104 U. S. 279 394
Bement *v.* National Harrow Co., 186 U. S. 70 265
Berea College *v.* Kentucky, 211 U. S. 45 54, 497
Bernheimer *v.* Converse, 206 U. S. 516 568
Bigelow, *Ex parte*, 113 U. S. 328 296
Big Meadow Gas Co., *In re.* 113 Fed. Rep. 974 448
Bilik *v.* Strassheim, 212 U. S. 551 555
Birkett *v.* Knickerbocker Ice Co., 110 N. Y. 504 182
Black *v.* Elkhorn, 163 U. S. 445 396

Digitized by Google

PAGE

Blackheath, The, 195 U. S. 361 474
Bliven *v.* Hudson River R. R. Co., 36 N. Y. 403 314
Block *v.* Darling, 140 U. S. 234 403
Block *v.* The State, 100 Ind. 357 196
Boatmen's Bank *v.* Fritzlen, 75 Kan. 479 372
Boatmen's Bank *v.* Fritzlen, 135 Fed. Rep. 650 371, 373
Boyd *v.* United States, 116 U. S. 616 352
Brothers, The, 2 Biss. 104; *S. C.*, Fed. Cas. No. 9322 477
Brown *v.* New Jersey, 175 U. S. 172 107
Brown *v.* United States, 171 U. S. 631 296
Brunswig *v.* White, 70 Tex. 504 181
Buchanan *v.* Litchfield, 102 U. S. 278 65, 68
Buckstaff *v.* Russell & Co., 151 U. S. 626 403
Burgess *v.* Seligman, 107 U. S. 20 73
Cairo *v.* Zane, 149 U. S. 122 66
Campbell *v.* Porter, 162 U. S. 478 456
Capitol Nat. Bank *v.* First Nat. Bank, 172 U. S. 425 564
Cariño *v.* Insular Government, 7 Philippine, 132 455
Carroll County *v.* Smith, 111 U. S. 556 78
Carson *v.* Titlow, 38 Wash. 196 158
Centennial, The, 7 Fed. Rep. 601 363
Central Loan & Trust Co. *v.* Campbell, 173 U. S. 84 349
Central R. R. Co. *v.* Keegan, 160 U. S. 259 541
Central Stock Yards Co. *v.* Louisville & N. R. Co., 118 Fed. Rep. 113 133, 145
Chaffee County *v.* Potter, 142 U. S. 355 66
Chambers County *v.* Clews, 21 Wall. 317 70
Chapman *v.* Bowen, 207 U. S. 89

PAGE

Chattanooga Foundry & Pipe Works *v.* Atlanta, 203 U. S. 390 270
Cheshire, The, 3 Wall. 231 307
Chicago & Alton R. R. *v.* Wiggins Ferry Co., 119 U. S. 615 552
Chicago, B. & Q. Ry. *v.* Williams, 205 U. S. 444 363
Chicago, Milwaukee &c. Ry. *v.* Tompkins, 176 U. S. 167 421
Chicago &c. Ry. Co. *v.* Martin, 178 U. S. 245; *S. C.*, 57 Kan. 437 387
China, The, 7 Wall. 53 474
Chin Bak Kan *v.* United States, 186 U. S. 193 567
Cincinnati, P., B. S. & P. Packet Co. *v.* Bay, 200 U. S. 179 269
Citizens' Savings Bank *v.* Owensboro, 173 U. S. 636 346
City of Lexington *v.* Butler, 14 Wall. 283 77
City of Lincoln *v.* Power, 151 U. S. 436 181
City of San Antonio, The, 143 Fed. Rep. 955 227
Clarita, The, and The Clara, 23 Wall. 1 474
Clark *v.* Barnwell, 12 How. 272 361
Clark *v.* Nash, 198 U. S. 361 151
Clement *v.* Crosby, 148 Mich. 293 179
Cleveland Terminal & Valley R. R. Co. *v.* Cleveland S. S. Co., 208 U. S. 316 558
Cochran &c. *v.* Montgomery County, 199 U. S. 260 384
Coffey *v.* Harlan County, 204 U. S. 659 111
Cohens *v.* Virginia, 6 Wheat. 264 40
Columbia George and Toy Toy, *In re*, 201 U. S. 641 547
Commissioners *v.* Bolles, 94 U. S. 104 65
Compta, The, 4 Sawy. 375 363
Connecticut River R. R. Co. *v.* County Commissioners, 127 Mass. 50 144
Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540 256, 257, 258, 260, 261, 270, 271, 272

Digitized by Google

PAGE

Connors *v.* United States, 158 U. S. 408 497, 506
Consolidated Fireworks Co. *v.* Koehl, 190 Ill. 145 225
Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541 348
Continental Wall Paper Co. *v.* Voight & Sons Co., 148 Fed. Rep. 939 256, 274
Converse, *In re*, 137 U. S. 624 107
Coombs *v.* Anderson, 138 Mass. 376 211
Coppell *v.* Hall, 7 Wall. 542 263
Cotton *v.* Hawaii, 211 U. S. 162 209
County of Cass *v.* Gillette, 100 U. S. 585 77
County of Warren *v.* Marcy, 97 U. S. 96 76
Covington &c. Turnpike Co. *v.* Sandford, 164 U. S. 578 17
Crawford *v.* Burke, 195 U. S. 176 448
Crawford *v.* Naller, 111 U. S. 796 570
Cross *v.* Burke, 146 U. S. 82 296
Cummings *v.* Chicago, 188 U. S. 410 412
Davis *v.* Texas, 139 U. S. 651 107
Davis *v.* United States, 107 Fed. Rep. 753 57
Dealy *v.* United States, 152 U. S. 539 192
DeCambra *v.* Rogers, 189 U. S. 119 444
Deery *v.* Cray, 5 Wall. 795 203
Delaware &c. R. Co. *v.* Hardy, 59 N. J. L. 35 225
Delory *v.* Blodgett, 185 Mass. 126 225
Dennis *v.* Slyfield, 117 Fed. Rep. 474 268
Desjeiro, *Ex parte*, 152 Fed. Rep. 1004 321
Donovan *v.* Laing, L. R. (1893) 1 Q. B. D. 189 224
Dow *v.* Johnson 100 U. S. 158 86
Dower *v.* Richards, 151 U. S. 658 97
Driesbach *v.* National Bank, 104 U. S. 52 273
Driscoll *v.* Towle, 181 Mass. 416 226

PAGE

Dynes *v.* Hoover, 20 How. 65 520
Eagan *v.* Hart, 165 U. S. 188 552
Eastin & Knox *v.* Texas &c. Co., 99 Tex. 654; *S. C.*, 92 S. W. Rep. 838 386
Edwards *v.* Bates Co., 163 U. S. 269 75
Edwards *v.* White Line Transit Co., 104 Mass. 159 314
Edwin I. Morrison, The, 153 U. S. 199 363
Egan *v.* Hart, 165 U. S. 188 97
Elder *v.* Horseshoe Min. & M. Co., 194 U. S. 248 395
Elder *v.* Wood, 208 U. S. 226 395
Eliza Lines, The, 199 U. S. 119 272
Elkins *v.* McKean, 79 Pa. St. 493 179
Ellis *v.* Republic Oil Co., 133 Iowa, 11 175
Elton, The, 142 Fed. Rep. 367 219, 225
Embrey *v.* Jemison, 131 U. S. 336 263
Employers' Liability Cases, 207 U. S. 463 496
Estes *v.* Timmons, 199 U. S. 391 444
Eugene F. Moran, The, 143 Fed. Rep. 187; *S. C.*, 154 Fed. Rep. 41; *S. C.*, 83 C. C. A. 153 473
Eustis *v.* Bolles, 150 U. S. 361 117, 552
Evansville *v.* Dennett, 161 U. S. 434 67, 69, 70
Ewell *v.* Daggs, 108 U. S. 143 548
Express, The, 44 Fed. Rep. 392; *S. C.*, 46 Fed. Rep. 860; *S. C.*, 52 Fed. Rep. 89 475
Express, The, 46 Fed. Rep. 864 474
Farmers' Loan & Trust Co. *v.* Lake Street Elec. Ry. Co., 177 U. S. 51 129
Farmers' & Mechanics' Nat. Bank *v.* Dearing, 91 U. S. 29 273
Farwell *v.* Boston & Worcester R. R. Corp., 4. Met. 49 221
Fauntleroy *v.* Lum, 210 U. S. 230 314
Fish *v.* Union Pacific R. Co., 8 Blatchf. 243 386

Digitized by Google

PAGE

Fitzgerald *v.* Missouri Pac. R. R., 160 U. S. 556 372
Fitzpatrick *v.* United States, 178 U. S. 304 57
Fong Yue Ting *v.* United States, 149 U. S. 698 567
Forbes *v.* Gracey, 94 U. S. 762 394, 395
Frasch *v.* Moore, 211 U. S. 1 284, 289, 562
Frederick L. Grant Shoe Co., *In re*, 125 Fed. Rep. 576; *S. C.*, 130 Fed. Rep. 881 447
Frederick L. Grant Shoe Co. *v.* Laird Co., 203 U. S. 502 447
Freeman *v.* McGaw, 15 Pick. 82 210
Friendschaft, The, 4 Wheat. 105 307
Friese *v.* Hummel (Ore.), 37 Pac. Rep. 458 444
Fritzlen *v.* Boatmen's Bank, 198 U. S. 586 371
Gaines *v.* Knecht, 27 App. D. C. 530 291
Gaines & Co. *v.* Knecht & Son, 212 U. S. 561 289, 290
Garrozi *v.* Dastas, 204 U. S. 64 569
Georgia Banking Co. *v.* Smith, 128 U. S. 174 534
Germanic, The, 196 U. S. 589 85
Gibbs *v.* Baltimore Gas Co., 130 U. S. 396 266
Giles *v.* Teasley, 193 U. S. 146 117
Gladestry, The, 128 Fed. Rep. 591 227
Good Shot *v.* United States, 179 U. S. 87 57
Gorris *v.* Scott, L. R. 9 Ex. 125 476
Grace &c. Co. *v.* Probst, 208 Ill. 147 225
Gray Jacket, The, 5 Wall. 342 307
G. R. Booth, The, 171 U. S. 450 179, 361
Great Falls Mfg. Co. *v.* Attorney General, 124 U. S. 581 303, 304
Green *v.* Van Buskerk, 7 Wall. 139 313
Griswold *v.* Waddington, 16 Johns. 438 307
Gulf Railroad Co. *v.* Hefley, 158 U. S. 98 504
Gunnison County Commissioners *v.* Rollins, 173 U. S. 255 66

PAGE

Guy *v.* Donald, 203 U. S. 399 221
Hackett *v.* Ottawa, 99 U. S. 86 66
Hale *v.* Henkel, 201 U. S. 43 349
Hammond *v.* Johnson, 142 U. S. 73 559
Hammond Packing Co. *v.* State, 81 Ark. 519 340
Hanauer *v.* Doane, 12 Wall. 342 262
Hancock Nat. Bank *v.* Farnum, 176 U. S. 640 313
Hardin *v.* Shedd, 190 U. S. 508 565
Harding *v.* Illinois, 196 U. S. 78 116
Harless *v.* United States, 88 Fed. Rep. 97 295
Harley *v.* United States, 198 U. S. 229 309
Harris *v.* Balk, 198 U. S. 215 314
Harrison *v.* Myer, 92 U. S. 111 559
Hartford Ins. Co. *v.* State, 76 Ark. 303 332, 334, 340, 344, 345
Head *v.* Amoskeag Mfg. Co., 113 U. S. 9 151
Heath, *In re*, 144 U. S. 92 296
Heff, *In re*, 197 U. S. 488 549
Henry B. Hyde, The, 90 Fed. Rep. 114 362
Higgins *v.* Western Union Tel. Co., 156 N. Y. 75 224
Hijo *v.* United States, 194 U. S. 315 309
Hodges *v.* United States, 203 U. S. 1 565
Homer-Ramsdell Trans. Co. *v.* La Compagnie Générale Transatlantique, 182 U. S. 406 474
Honolulu Transit Co. *v.* Hawaii, 211 U. S. 282 8
Hovey *v.* Elliott, 167 U. S. 416 342, 349, 350, 351, 353
Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290 479
Hulbert *v.* City of Chicago, 202 U. S. 275 566
Hutchins *v.* Bierce, 211 U. S. 429 209
Hyde *v.* Shine, 199 U. S. 62 192
Illinois Cent. R. Co. *v.* Sanford, 75 Miss. 862 353
Insurance Co. *v.* Comstock, 16 Wall. 258 570

Digitized by Google

PAGE

Ins. Co. *v.* Easton & M. Transp. Co., 97 Fed. Rep. 653 363
Interstate Com. Com. *v.* Baird, 194 U. S. 25 534
Interstate Consolidated Street Ry. Co. *v.* Massachusetts, 207 U. S. 79 269
Johnson *v.* Boston, 118 Mass. 114 225
Johnson *v.* Mueser, 29 App. D. C. 61 284
Johnson *v.* Netherlands &c. Co., 132 N. Y. 576 227
Johnson *v.* Risk, 137 U. S. 300 552
Jones *v.* Mayor &c., 14 Q. B. D. 890 222
Jones *v.* Scullard, 2 Q. B. (1898) 565 222
Kansas City Norw. R. R. Co. *v.* Zimmerman, 210 U. S. 336 558
Keely *v.* Sanders, 99 U. S. 441 85
Kemmler, *In re*, 136 U. S. 436 281
Kentucky & I. Bridge Co. *v.* Louisville & Nashville R. R. Co., 37 Fed. Rep. 567 147
Kilroy *v.* Canal Co., 121 N. Y. 22 225
Kimball *v.* Cushman, 103 Mass. 194 225
Knoxville *v.* Knoxville Water Co., 212 U. S. 1 41, 425
Knoxville Water Co. *v.* Knoxville, 189 U. S. 434 6
Kohl *v.* United States, 91 U. S. 367 147
Komuk, The, 120 Fed. Rep. 841 476
Lake Shore & Mich. So. R. R. *v.* Prentice, 147 U. S. 101 493
Lamar's Ex'r *v.* Browne, 92 U. S. 187 306
Landers *v.* Felton, 73 Fed. Rep. 311 385
Lawrence *v.* Minturn, 17 How. 100 85
Lawson *v.* Black Diamond Mining Co., 44 Wash. 26 353
Leathe *v.* Thomas, 207 U. S. 93 117
Lennox, The, 90 Fed. Rep. 308 362
Lincoln, *In re*, 202 U. S. 178 549
Lip Hop Fong *v.* United States, 209 U. S. 453 567
Lismacrieve, The, 87 Fed. Rep. 570 227

PAGE

Little *v.* Hackett, 116 U. S. 366 222
Liverpool & Great Western S. S. Co. *v.* Phenix Ins. Co., 129 U. S. 397 361
Loeb *v.* Trustees of Columbia Twp., 179 U. S. 472 479
Loewe *v.* Lawlor, 208 U. S. 274 266
Logan *v.* United States, 144 U. S. 263 58
Lothrop *v.* Adams, 133 Mass. 471 493
Louisville & Nashville Ry. Co. *v.* Central Stock Yards Co., 192 U. S. 568 138, 144, 145
Louisville & Nashville Ry. *v.* Commonwealth, 99 Ky. 132 109
Louisville & Nashville R. R. Co. *v.* Miller, 112 Ky. 464 140
Louisville Trust Co. *v.* Comingor, 184 U. S. 18 548
Lowber *v.* Bangs, 2 Wall. 728 404
Lund *v.* Chicago &c. Ry. Co., 78 Fed. Rep. 385 385
Luther *v.* Borden, 7 How. 1 83
Lydian Monarch, The, 23 Fed. Rep. 298 363
Lyndhurst, The, 92 Fed. Rep. 681 475, 476
McCorquodale *v.* Texas, 211 U. S. 432 118
McDaniel *v.* Traylor, 196 U. S. 415 430
McGough *v.* Ropner, 87 Fed. Rep. 534 227
McGregor *v.* United States, 134 Fed. Rep. 187 566
McMullen *v.* Hoffman, 174 U. S. 639 262
McNeill *v.* Southern Ry. Co., 202 U. S. 543 143
Maling, The, 110 Fed. Rep. 227 475, 476
Manuel *v.* Wulff, 152 U. S. 505 395
Marcy *v.* Town of Oswego, 92 U. S. 637 66
Martin *v.* Atchison, T. & S. F. R. R., 166 U. S. 399 541
Martin, *Ex parte*, 13 Ark. 198 144
Martin *v.* St. Louis &c. Ry., 134 Fed. Rep. 134 386, 387
Martin *v.* Texas, 200 U. S. 316 282
Marvin *v.* United States, 42 Ct. Cls. 542 277

Digitized by Google

PAGE

Mattson, *In re*, 69 Fed. Rep. 535 321
Mattox *v.* United States, 146 U. S. 140 215
Max Morris, The, 137 U. S. 1 476
Meheula *v.* Pioneer Mill Co., 17 Hawaii, 91 209
Mercer County *v.* Hacket, 1 Wall. 83 66
Metropolitan R. R. Co. *v.* District of Columbia, 195 U. S. 322 456
Metropolitan Railway Receivership, *In re*, 208 U. S. 90 40
Miller *v.* United States, 11 Wall. 268 306
Minneapolis &c. *v.* Minnesota, 186 U. S. 257 54
Moelle *v.* Sherwood, 148 U. S. 21 211
Monongahela Co. *v.* United States, 148 U. S. 312 44
Montague & Co. *v.* Lowry, 193 U. S. 38 264
Montclair *v.* Ramsdell, 107 U. S. 147 70
Montgomery *v.* Portland, 190 U. S. 89 412
Moody *v.* Jacksonville, Tampa & Key West R. R. Co., 20 Fla. 597 144
Morales, *In re*, 105 Fed. Rep. 761 449
Moran *v.* Horsky, 178 U. S. 205 552, 559
Motes *v.* United States, 178 U. S. 458 58
Moyer, *In re*, 35 Colo. 154 82
Moyer *v.* Peabody, 148 Fed. Rep. 870 82
Mullan *v.* United States, 42 Ct. Cl. 157 517
Murdock *v.* Stickney, 8 Cush. 113 151
Murray *v.* Currie, L. R. 6 C. P. 24 222
Murray *v.* Dwight, 161 N. Y. 301 225
Murray *v.* Hoboken Land & I. Co., 18 How. 272 84
Murray *v.* Lardner, 2 Wall. 110 70
Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291 564, 565

PAGE

National Cotton Oil Co. *v.* Texas, 197 U. S. 115 107
Nesbit *v.* Riverside Ind. Dist., 144 U. S. 610 75
Nettie L. Tice, The, 110 Fed. Rep. 461 475
New England R. R. *v.* Conroy, 175 U. S. 323 541
New Haven R. R. Co. *v.* Interstate Com. Com., 200 U. S. 399 495
New Orleans Water Works Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18 559
New York Central R. R. Co. *v.* United States, 212 U. S. 481 503, 504, 505, 514
New York Central R. R. *v.* United States, No. 2, 212 U. S. 500 514
New York, N. H. & H. R. R. Co. *v.* Interstate Com. Com., 200 U. S. 361 531, 532
Nichols Lumber Co. *v.* Franson, 203 U. S. 278 447
Northern Pac. R. R. *v.* Charless, 162 U. S. 359 541
Northern Pac. R. R. *v.* Dixon, 194 U. S. 338 541
Northern Pac. R. Co. *v.* Egeland, 56 Fed. Rep. 200 542
Northern Pac. R. R. *v.* Egeland, 163 U. S. 93 541
Northern Pac. R. R. *v.* Hambly, 154 U. S. 349 541
Northern Pac. R. R. *v.* Peterson, 162 U. S. 346 541
Northern Securities Case, 193 U. S. 197 110
Norton *v.* Doherty, 3 Gray, 372 449
Notley *v.* Brown, 208 U. S. 429 570
Oates *v.* National Bank, 100 U. S. 239 73, 273
Offield *v.* New York & N. H. R. R. Co., 203 U. S. 372 151
Ohio & Miss. Ry. Co. *v.* Yohe, 51 Ind. 181 314
Orleans *v.* Platt, 99 U. S. 676 77
Ormsby *v.* Webb, 134 U. S. 47 456
Ortega *v.* Lara, 202 U. S. 339 569
Osborn *v.* Bank of United States, 9 Wheat. 738 384

Digitized by Google

PAGE

Otis Co. *v.* Ludlow Co., 201 U. S. 140 150
Ottawa *v.* National Bank, 105 U. S. 342 66
Owen *v.* United States, 41 Ct. Cls. 69 277
Oxley Stave Co. *v.* Butler County, 166 U. S. 648 564
Pacific Railroad Removal Cases, 115 U. S. 1 384
Palmer *v.* Texas, 212 U. S. 118 115
Pana *v.* Bowler, 107 U. S. 529 73
Parkhurst *v.* Swift, 31 Ind. App. 521 225
Patria, The, 132 Fed. Rep. 971 362
Patton *v.* Texas &c. Ry. Co., 179 U. S. 658 176
Peerless Mfg. Co. *v.* Bagley, 126 Mich. 225 478
People *v.* O'Brien, 111 N. Y. 1 44
People's Bank *v.* Calhoun, 102 U. S. 258 126
Perez *v.* Fernandez, 202 U. S. 80 569
Peshtigo, The, 25 Fed. Rep. 488 477
Phœnicia, The, 90 Fed. Rep. 116; *S. C.*, 99 Fed. Rep. 1005 363
Pinkerton *v.* Bailey, 8 Wend. 600 70
Pittsburg &c. Ry. Co. *v.* Collins, 168 Ind. 467 561
Pittsburg &c. Ry. Co. *v.* Lightheiser, 168 Ind. 438 561
Pittsburg &c. Ry. Co. *v.* Ross, 80 N. E. Rep. 845 561
Ponce *v.* Roman Catholic Church, 210 U. S. 296 465
Pope *v.* Louisville, New Albany &c. Ry. Co., 173 U. S. 573 480
Potter *v.* Hall, 189 U. S. 292 442
Powers *v.* Ches. & Ohio Ry., 169 U. S. 92 372, 374
Pray *v.* Pierce, 7 Mass. 381 210
Prentis *v.* Atlantic Coast Line, 211 U. S. 210 40
Prentis *v.* Southern Ry. Co., 211 U. S. 210 8
Presque Isle, The, 140 Fed. Rep. 202 363
Provident Sav. Life Assur. Co. *v.* Ford, 114 U. S. 635 480
Pumpelly *v.* Green Bay Co., 13 Wall. 166 151
Quarles, *In re*, 158 U. S. 532 58

PAGE

Quarman *v.* Burnett, 6 M. & W. 499 222
Queen *v.* Great North of England Ry. Co., 9 Q. B. 315 493
Queen, The, 78 Fed. Rep. 155; *S. C.*, 94 Fed. Rep. 180 363
Quimby *v.* Boyd, 128 U. S. 488 97
Quinlan *v.* Green County, 205 U. S. 410 70
Radford *v.* United States, 129 Fed. Rep. 49 566
Railroad Co. *v.* O'Donnell, 49 Oh. St. 489 314
Railway Co. *v.* Dey, 35 Fed. Rep. 866 109
Railway Company *v.* Fitzgerald, 160 U. S. 556 552
Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362 17, 54, 420
Red River Cattle Co. *v.* Needham, 137 U. S. 632 210
Reed, *Ex parte*, 100 U. S. 13 520
Roberts *v.* Fullerton, 117 Wis. 222 321
Roller *v.* Holly, 176 U. S. 398 144
Rourke *v.* White Moss Colliery Co., L. R. (1876) 2 C. P. D. 205 223
Rowland *v.* Eskeland, 40 Wash. 253 158
Royal Ins. Co. *v.* Martin, 192 U. S. 149 569
Russell *v.* Coffin, 8 Pick. 143 210
Russell *v.* United States, 182 U. S. 516 309
S. A. McCaulley, The, 116 Fed. Rep. 107 475
San Antonio *v.* Mehaffy, 96 U. S. 312 70
San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439 17, 41
San Diego Land & Town Co. *v.* National City, 174 U. S. 739 16, 41
Sanford *v.* Standard Oil Co., 118 N. Y. 571 227
Saratoga Springs *v.* Saratoga Gas &c. Co., 191 N. Y. 123 41
Savannah &c. R. R. Co. *v.* Willcox, Gibbs & Co., 48 Ga. 432 314

Digitized by Google

PAGE

Savings Bank *v.* Ward, 100 U. S. 195 178
Schick *v.* United States, 195 U. S. 65 519
Schlemmer *v.* Buffalo, R. & P. Ry. Co., 205 U. S. 1 271
School District *v.* Stone, 106 U. S. 183 65, 68
Schuchardt *v.* Allens, 1 Wall. 359 449
Security Trust & Safety Vault Co. *v.* Lexington, 203 U. S. 323 144
Shaw *v.* United States, 141 Fed. Rep. 469; *S. C.*, 203 U. S. 591 560
Sherman County *v.* Simons, 109 U. S. 735 66
Shields *v.* Coleman, 157 U. S. 168 130
Shipley *v.* Gaffner, 48 Wash. 169 158
Slingsby, The, 120 Fed. Rep. 748 219
Sloga, The, 10 Ben. 315 363
Smiley *v.* Kansas, 196 U. S. 447 107
Smiths *v.* Shoemaker, 17 Wall. 630 203
Smyth *v.* Ames, 169 U. S. 466 17
Spokane Falls & Nor. Ry. *v.* Abitz, 38 Wash. 8 158
Spokane Land & Water Co. *v.* Madson, 40 Wash. 414; *S. C.*, 91 Pac. Rep. 1 566
Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397 479
Stanislaus County *v.* San Joaquin Co., 192 U. S. 201 17
Stanly County *v.* Coler, 190 U. S. 437 70
Star of Hope, The, 9 Wall. 203 85
State *v.* Columbia George, 39 Ore. 127 547
State *v.* Lancashire Fire Ins. Co., 66 Ark. 466 331, 333
State of Texas *v.* Palmer, 158 Fed. Rep. 705 125, 126
Stephens *v.* Monongahela Bank, 111 U. S. 197 273
Sterling Coal Co. *v.* Silver Spring Bleaching & Dyeing Co., 162 Fed. Rep. 848 268
Stiles *v.* Davis, 1 Black, 101 313
St. Louis *v.* Hill, 116 Mo. 527 144

PAGE

St. Louis, Iron Mtn. & S. Ry. Co. *v.* Taylor, 210 U. S. 281 313
Stowell *v.* Standard Oil Co., 139 Mich. 18 179
St Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142 559
Strickley *v.* Highland Boy Mining Co., 200 U. S. 527 151
Sturgis *v.* Boyer, 24 How. 110 473, 474
Svend, The, 1 Fed. Rep. 54 363
Swafford *v.* Templeton, 185 U. S. 487 374
Swaim *v.* United States, 165 U. S. 553 520
Swift *v.* Tyson, 16 Pet. 1 70, 73
Swift & Co. *v.* United States, 196 U. S. 375 110, 265
Telegram Newspaper Co. *v.* Commonwealth, 172 Mass. 294 493
Texas & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426 274
Texas &c. Ry. *v.* Barrett, 166 U. S. 617 387
Texas & Pacific Ry. Co. *v.* Cody, 166 U. S. 606 386
Texas & Pacific &c. Co. *v.* Huber, 100 Tex. 1; *S. C.*, 92 S. W. Rep. 832 386
Texas & Pac. Ry. Co. *v.* Mugg, 202 U. S. 242 504
Thayer *v.* Spratt, 189 U. S. 346 97
Thompson *v.* Selden, 20 How. 194 352
Thornton *v.* Natchez, 88 Miss. 1; *S. C.*, 129 Fed. Rep. 86; *S. C.*, 197 U. S. 620 559
Tindle *v.* Birkett, 205 U. S. 183 448
Town of Coloma *v.* Eaves, 92 U. S. 484 65
Town of Venice *v.* Murdock, 92 U. S. 494 66
Tozer *v.* United States, 52 Fed. Rep. 917 109
Traction Co. *v.* Mining Co., 196 U. S. 239 384
Trans-Missouri Traffic Assn. Case, 166 U. S. 290 108
Troy, The, 208 U. S. 321 558
Tullis *v.* Lake Erie & Western R. R. Co., 175 U. S. 348 561

Digitized by Google

PAGE

Twining v. New Jersey, 211 U. S. 78 107
Tyler v. Court of Registration, 175 Mass. 71 456
Union Steamship Co. v. Claridge, Appeal Cases, 1894, p. 185 224
United States v. Bellingham Bay Boom Co., 176 U. S. 211 412
United States v. Dickson, 15 Pet. 141 534
United States v. Finnell, 185 U. S. 236 277
United States v. Great Falls Mfg. Co., 112 U. S. 645 303, 304, 310
United States v. Hirsch, 100 U. S. 33 192
United States v. Ju Toy, 198 U. S. 253 84
United States v. Keitel, 211 U. S. 370 192
United States v. Knight, 156 U. S. 1 109
United States v. Lee Yen Tai, 185 U. S. 213 567
United States v. Lynah, 188 U. S. 445 303, 305
United States v. New York Cent. & H. R. R. Co., 157 Fed. Rep. 293 514
United States v. Pacific R. R. Co., 120 U. S. 227 307
United States v. Shaw, 144 Fed. Rep. 329 560
United States v. Shipp, 203 U. S. 563 549
United States v. Smith, 124 U. S. 525 193
United States v. Throckmorton, 98 U. S. 65 444
Valenton v. Murciano, 3 Phil. Rep. 537 460
Vance v. Burbank, 101 U. S. 514 444
Van Hostrup v. Madison City, 1 Wall. 291 69
Venice, The, 2 Wall. 258 307
Venus, The, 8 Cranch, 253 307
Victoria, The, 69 Fed. Rep. 160 227
Virginia Railroad Commission Cases, 211 U. S. 210 147

PAGE

Wabash Railroad v. Adelbert College, 208 U. S. 38 125
Waite v. Santa Cruz, 184 U. S. 302 69
Walsh v. Columbus &c. R. R. Co., 176 U. S. 479 479
Ward v. Cochran, 150 U. S. 597 213
Ward v. Hobbs, 4 App. Cas. 13 476
Ward v. Joslin, 186 U. S. 142 181
Washington Gas Light Co. v. Lansden, 172 U. S. 534 494
Water, Light & Gas Co. v. City of Hutchinson, 207 U. S. 385 556
Waters-Pierce Oil Co. v. State, 103 S. W. Rep. 836 124, 126
Waters-Pierce Oil Co. v. State, 103 S. W. Rep. 836; *S. C.*, 105 S. W. Rep. 851 115
Waters-Pierce Oil Co. v. State, 106 S. W. Rep. 918 97
Waters-Pierce Oil Co. v. State, 106 S. W. Rep. 326 127, 128, 131
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86 113, 118, 123, 124, 147
Waters-Pierce Oil Co. v. Texas, (No. 2), 212 U. S. 112 123, 124, 127, 131
Waters-Pierce Oil Co. v. Texas, 177 U. S. 28 101
Wecker v. National Enameling Co., 204 U. S. 176 372
Wedding v. Meyler, 192 U. S. 573 319
Weeks v. Bridgman, 159 U. S. 541 548
Weiser v. Holsman, 33 Wash. 87 179
Weldon v. Fritslen, 128 Fed. Rep. 608 366
Wellington v. Downer Kerosene Oil Co., 104 Mass. 64 179
Wells v. Maine Steamship Co., 4 Cliff. 228 314
West v. Louisiana, 194 U. S. 258 107
Western Loan & Sav. Co. v. Butte & Boston Mining Co., 210 U. S. 368 556
White v. Bird, 45 Kan. 759 564
Wiborg v. United States, 163 U. S. 632 194

Digitized by Google

PAGE

Willcox *v.* Consolidated Gas Co., 212 U. S. 19 216, 425
Williamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1 412
Williams *v.* Jones, 3 H. & C. 256 474
Williamson *v.* Price, 4 Mart. N. S. 399 474
Wilson *v.* Salamanca, 99 U. S. 499 66
Winona & St. Peter R. R. Co. *v.* Plainview, 143 U. S. 371 559
Wyllie *v.* Palmer, 137 N. Y. 248 225
Young, *Ex parte*, 209 U. S. 123 16, 17, 54, 421
Young *v.* United States, 97 U. S. 39 306
Zone, The, 2 Sprague, 19 363

Digitized by Google

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

PAGE

1789, Sept. 24, § 15, 1 Stat. 73, ch. 20 351
1853, Mch. 2, §§ 1, 21, 10 Stat. 172, c. 90 316
1859, Feb. 14, §§ 1, 2, 11 Stat. 383, c. 33 316
1863, Mch. 3, § 9, 12 Stat. 767, c. 92 310
1864, June 3, 13 Stat. 99, c. 106 273
1871, Mch. 3, 16 Stat. 573, c. 122 384
1875, Mch. 3, 18 Stat. 470, c. 137 ..... 383, 389
1877, Mch. 3, c. 107, 19 Stat. 377 565
1882, Aug. 5, 22 Stat. 286, c. 391 517
1887, Feb. 4, § 3, 24 Stat. 379, c. 104 ..... 139, 146, 507
§ 22 ..... 274, 535
1887, Mch. 3, 24 Stat. 505, c. 359 ..... 302, 310
1887, Mch. 3, 24 Stat. 552, c. 373 383
1888, Aug. 13, 25 Stat. 433, c. 866 383
1888, Sept. 13, § 13, 25 Stat. 476 567
1889, Feb. 4, §§ 2, 3, 24 Stat. 379, c. 104 529
1889, Mch. 1, 25 Stat. 783, c. 333 294
1889, Mch. 2, 25 Stat. 855 535
§ 1 ..... 504, 507
§ 6 ..... 504, 508, 514, 531
§ 10 ..... 504, 507
1890, July 2, §§ 1, 2, 3, 26 Stat. 209 ..... 254, 257, 258, 259, 260, 266
§§ 4, 6, 7 273

PAGE

1890, Sept. 19, §§ 7, 10, 26 Stat. 454, c. 907 ..... 412, 413
1891, Mch. 3, § 4, 26 Stat. 826, c. 517 447
§ 5 ..... 56, 58, 294, 447
§ 6 ..... 295, 359, 479
§ 13 295
1892, May 5, §§ 3, 6, 27 Stat. 25 567
1893, Feb. 9, §§ 8, 9, 27 Stat. 434, c. 74 289
1893, Mch. 3, § 1, 28 Stat. 7 567
1895, Feb. 8, 28 Stat. 643, c. 61 535
1895, Mch. 1, 28 Stat. 693, c. 145 295
1897, June 7, § 2, 30 Stat. 96, c. 4 476
1897, July 20, 29 Stat. 492, c. 68 56
1898, July 1, ch. II, § 2, 30 Stat. 544, c. 541 275
1898, July 1, § 17, 30 Stat. 544 448
§ 24*b* 447
§ 59*b* 447, 448
§ 63*a* 448, 449
§ 63*b* 447
1899, Mch. 3, § 10, 30 Stat. 1151, c. 425 ..... 412, 413
1900, Apr. 12, §§ 34, 35, 31 Stat. 77, c. 191 569
1901, Mch. 2, § 3, 31 Stat. 953, c. 812 569
1902, Mch. 11, § 10, 32 Stat. 68, c. 183 ..... 388, 389
1902, July 1, § 12, 32 Stat. 691, c. 1369 ..... 458, 459
§ 5 459
§ 14 459

Digitized by Google

PAGE

1903, Feb. 19, 32 Stat. 847 491, 495, 500, 503, 504, 506, 507, 508, 514, 531, 563
§ 1 ..... 496, 515, 530
§ 3 ..... 528, 530
1904, Apr. 27, 33 Stat. 394 ... 567
1905, Feb. 20, §§ 6, 7, 33 Stat. 724 290
§ 9 ..... 291, 562
§§ 16, 17, 18 562
1905, Mch. 3, § 12, 33 Stat. 1081, c. 1479 296
1905, Mch. 3, 33 Stat. 1035, c. 1465 570
1906, June 29, 34 Stat. 340, c. 3504 553
1906, June 29, 34 Stat. 584, c. 3591 ..... 149, 530, 531
§ 1 ..... 533, 534, 535
1907, Mch. 2, 34 Stat. 1246 ... 512
1908, Mch. 10, 35 Stat. 40, c. 76 555
Revised Statutes.
§ 574 275
§ 629, cl. 16 83

PAGE

Revised Statutes (*cont.*).
§ 638 275
§ 707 556
§ 709 ..... 97, 412
§ 724 ..... 351, 353
§ 800 194
§ 828 275
§ 1008 447
§ 1025 497
§ 1066 310
§ 1447 517
§ 1624, art. 60 519
art. 54 521
arts. 38, 53 521
§ 1979 83
§ 2322, 2 Comp. Stat. 1425 394
§ 4914 ..... 289, 291
§ 4915 291
§ 5339 547
§ 5440 188
§§ 5508, 5509 ..... 56, 58, 564
Compiled Statutes.
1 Comp. Stat., p. 623 194

(B.) Statutes of the States and Territories.

Arizona.
1891, Sess. Laws of 1891, Act No. 50, p. 50, § 4 .. 393
1897, Sess. Laws of 1897, ch. 10, p. 8, § 5 395
Arizona Stats., pars. 2708, 2948 395
Arkansas.
1899, Mch. 6, Acts of 1899, p. 50 331
1905, Jan. 23, Acts of 1905, p. 1 ..... 330 *et seq.*
Kirby's Dig. Laws, §§ 824–827 331
Colorado.
1897, Laws of 1897, c. 63, Art. 7, § 2, p. 204 84
District of Columbia.
Code, § 1532 188
§§ 215, 217 ... 193, 195
§ 1 195
Illinois.
1893, Jan. 1, Laws Ill. 1893, p. 182; Hurd's Rev. Stat. Ill. 1899, p. 618 ..... 257, 260

Kentucky.
1903, Ky. Stat. Carroll, 1903, § 213 ..... 139, 142
§ 214 140
Louisiana.
Const. La., Arts. 284, 285 420
Massachusetts.
1882, Pub. Stat. 1882, c. 190 151
Gen. Stat., c. 89, § 4 211
Pub. Stat., c. 120, § 5 211
R. L. 1902, c. 127, § 2 211
§ 24 211
R. S. 1836, c. 59, § 5 211
New York.
1884, Laws of 1884, ch. 367 ..... 43, 47
1905, Laws of 1905, chs. 736, 737 24
1906, Laws of 1906, ch. 125 ..... 24, 41
Oklahoma.
1895, Laws of 1895, § 1, p. 174 ..... 166, 175
1899, Sess. Laws, 1899, p. 186 .... 167, 172, 174, 175

Digitized by Google

PAGE

Oregon.
1907, Sess. Laws, 1907, p. 154 317
Philippine Islands.
1903, Philippine Commission's Act, No. 926, of 1903 457
1902, Philippine Commission's Act, No. 496, of 1902 457
Texas.
1881, Feb. 11, Gen. Laws, 1881, p. 5..... 63
1884, Gen. Laws, 1884, p. 28 63
1885, Mch. 27, Gen. Laws, 1885, p. 56.....63, 64
1899, Anti-trust Act, Laws 26th Leg., p. 246. 96, 97, 98, 100, 109, 112

PAGE

Texas (*cont.*).
1903, Mch. 31, Laws 28th Leg., p. 119....96, 97, 100, 103, 109, 112
1907, Apr. 11, Gen. Laws, 1907, p. 000..114, 116, 127, 131, 132
Sayles's Civ. Stat., Art. 1465, subd. 3..116, 127, 131
Civ. Stats. of Texas, Arts. 1222, 1223..... 388
Virginia.
Code, § 3664..... 56
Washington.
1899, Sess. Laws, 1899, p. 194..... 317
Ballinger's Ann. Code and Stat. § 6013..... 353
Ballinger's Code, Stats. of Wash., vol. I, § 1767.. 158

(C.) Statutes of Foreign Countries.

Spain.
Recopilacion de leyes de las Indias, Book 4, Title 12, Law 14..... 460

(D.) Treaties.

China.
Treaty of 1904, 33 Stat. 2215 567
Spain.
Treaty of Paris, April 11, 1899.....455, 457

Digitized by Google

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1908.

CITY OF KNOXVILLE *v.* KNOXVILLE WATER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 17. Argued April 28, 1908.—Decided January 4, 1909.

Rate making is a legislative function whether exercised by the legislature or by a subordinate body to which power has been delegated, such as a municipality.

While courts may refuse to enforce legislation on constitutional grounds the power should only be exercised in the clearest cases.

In ordinary equity suits findings of the master and the court below are conclusive here unless unsupported by the evidence or made under erroneous views of law; but where the constitutionality of a legislative act is involved, this court, from the respect due to legislative authority, will not regard such findings as conclusive.

In estimating for rate-fixing purposes the value of a plant, cost of reproduction is not a fair measure of value unless a substantial allowance is made for depreciation. *Quære*, whether anything can be allowed in the case of the plant of a public service corporation for "going concern" above the value of the separate tangible elements.

In valuing for rate-fixing the plant of a public service corporation, bonds and stocks issued for its purchase and construction in excess of its cost and by and to parties interested in and controlling the company, afford neither measure nor guide.

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In determining whether a rate affords a fair return the amount must be considered as fixed by the ordinance and not as voluntarily reduced by the corporation, even if such reduction be in accordance with custom and for the purpose of obtaining prompt payment.

In determining whether a rate is confiscatory the court is not confined to evidence as to the income of the corporation affected for the fiscal year during, or preceding that in, which the rate was fixed; it may receive evidence as to such income in subsequent years.

Federal courts should not declare an ordinance fixing rates for a public service corporation unconstitutional and suspend its operation before it goes into effect unless the rate is clearly confiscatory; and unless complainant furnishes substantial evidence to that effect, the bill should be dismissed without prejudice to a further application to the courts if the rate after going into effect is actually confiscatory.

A sufficient amount should be allowed from the earnings of a public service corporation for making good depreciation of plant and replacing deteriorated portions thereof; but amounts so expended cannot be considered as additional to the original cost in valuing the plant for purposes of ascertaining whether a rate is confiscatory.

Quære, and not decided, whether, under the circumstances of this case, an ordinance fixing a rate yielding a return of four per cent after allowing two per cent for depreciation is confiscatory, and amounts to a deprivation of property without due process of law or a taking of property without compensation.

THE facts, which involve the constitutional validity of an ordinance of the city of Knoxville fixing maximum rates to be charged for water by the defendant water company, are stated in the opinion.

Mr. George W. Pickle, with whom *Mr. J. Pike Powers, Junior*, *Mr. W. R. Turner* and *Mr. W. T. Kennerly* were on the brief, for appellant:

The ordinance of March 30, 1901, was not unconstitutional; it did not violate any valid contract between the city and the company, or undertake to change the contract as to rates between the company and the city itself, but only to regulate the rates charged by the water company to other water consumers than the city. The city has power to regulate the water rates by ordinance and that power has not been curtailed by contract.

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Knoxville Water Co. v. *Knoxville*, 107 Tennessee, 647; *S. C.*, 189 U. S. 434.

The ordinance of March 30, 1901, is not unconstitutional and void for the alleged reason that it was passed arbitrarily without notice to the water company or without giving it a hearing or an opportunity to be heard or without an investigation of its business. This contention is not supported by any proof. But if the facts averred were proved, that would not, as a matter of law, invalidate the ordinance. This question is precluded by the decisions hereinbefore cited.

The law under which the rates were fixed does not require notice or investigation, nor does it declare the action of the city council final. Unless the action of the city council had been made final and conclusive upon the water company, or the law had required notice and investigation and hearing, the ordinance fixing the rates remains open for inquiry of the character that is made in this case, and if the court finds that the rates are reasonable, or that there is any doubt of it, the same will be sustained. *San Diego &c. Co.* v. *Jasper*, 189 U. S. 439; *San Diego L. & T. Co.* v. *National City*, 174 U. S. 739.

The Supreme Court of Tennessee has held that the rates fixed by this ordinance are not made final and conclusive but remain open to judicial investigation. *Knoxville* v. *Water Co.*, 107 Tennessee, 688.

The rates prescribed by the city's ordinance of March 30, 1901, are not confiscatory. The Circuit Court should have determined this question for itself.

It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot of its own motion or upon the request of one party abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its officers. *Kimberly* v. *Arms*, 129 U. S. 512; *Patton* v. *Cone*, 1 Lea, 19; *Carey* v. *Williams*, 1 Lea, 54; *Jones* v. *Douglass*, 1 Tenn. Chy. 357; *Remsen* v. *Remsen*, 2 Johnson's

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Chy. Rep. 501; 2 Daniel's Chy. Prac. 1004, note 7; 1221, note 2 (4th ed.).

This court has, by its decisions, carefully guarded and limited the exercise of the jurisdiction of the courts affecting legislation, and has thus far permitted only the most sparing use of the power to revise or annul rates when fixed by legislative action. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Covington &c. Co.* v. *Sandford*, 164 U. S. 578, and *Smyth* v. *Ames*, 169 U. S. 466, discussed as clearly distinguishable from case at bar.

The cases are numerous in which relief, in cases of the character of the case at bar, has been denied by this court and by other courts. *San Diego Co.* v. *National City*, 174 U. S. 739; *Railroad Co.* v. *Wellman*, 143 U. S. 399; *Stanislas County* v. *San Joaquin Co.*, 192 U. S. 201; *Dow* v. *Beidleman*, 125 U. S. 680; *Railroad Co.* v. *Gill*, 156 U. S. 649; *San Diego L. & T. Co.* v. *Jasper*, 189 U. S. 439; *Railroad Co.* v. *Minnesota*, 186 U. S. 257; *Railroad Co.* v. *State*, 25 Florida, 310; *S. C.*, 3 L. R. A. 661.

So this court has refused to sustain the action of inferior courts restraining rates as unreasonable and confiscatory where the investigation reaching that result has been made in the lower courts along improper lines. *Railroad Company* v. *Tompkins*, 176 U. S. 167; *Railroad Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *Cotting* v. *Stock Yards*, 183 U. S. 79, 90.

Mr. J. W. Caldwell and *Mr. R. E. L. Mountcastle*, with whom *Mr. Charles T. Cates, Junior*, and *Mr. S. G. Shields* were on the brief, for appellee:

The rule of law applicable to this case is that the company is entitled to demand, in order that it may have just compensation, a fair return upon the reasonable value of the property at the time it is being used for the public. *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 757. See also *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578,

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597, 598; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 442; *Southern Pacific Co.* v. *Board of Commissioners*, 78 Fed. Rep. 261; *Cotting* v. *Stock Yards*, 79 Fed. Rep. 679, 684; *Smyth* v. *Ames*, 169 U. S. 547.

With respect to the date at which the fair value of the property of complainant devoted to the public service should be ascertained as a condition precedent to the ascertainment of what is a fair return thereon, it may be stated that no controversy has arisen in this case, so that said date was approximately March 30, 1901, the date of the passage of the ordinance attacked, though, as a matter of fact, the real date adopted was March 31, 1901, for the reason that March 31 was the close of the fiscal year of the company, and both valuation and income could more readily be arrived at by assuming that as the date of the inquiry. No assignment of error is made in this court controverting the proposition that the fair value of the property of complainant should be ascertained at the date when it was in fact ascertained in this case. *Smyth* v. *Ames*, 169 U. S. 466.

Each case must depend upon its special facts. *Turnpike Co.* v. *Sandford*, 164 U. S. 578. As to the elements to be considered in the ascertainment of the fair value of the plant devoted to the public service, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in such case. *Smyth* v. *Ames*, 169 U. S. 547.

The basis of calculation in a rates case is: the fair value of the property being used for the public convenience, and in ascertaining that fair value we may consider: The original cost of the plant; cost of permanent improvements; amount of bonds; market value of bonds; amount of stock; market value of the stock; present cost of construction; earning capacity

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under the ordinance; and operating expenses. *Smyth* v. *Ames*, *supra*.

The finding of the master as to the value of complainant's plant, as of the date of the passage of the ordinance, if supported by evidence in the case, and affirmed by the lower court, is unassailable in this court. And the findings were fully supported by the evidence. Taylor on Jurisdiction and Procedure of the United States Supreme Court, § 426, and cases cited; *B. & P. R. R. Co.* v. *Mackey*, 157 U. S. 92; *Anthony* v. *Louisville & Nashville Ry. Co.*, 132 U. S. 173; *Davis* v. *Schwartz*, 155 U. S. 636.

MR. JUSTICE MOODY delivered the opinion of the court.

This is an appeal by the city of Knoxville from a decree of the Circuit Court of the United States for the Eastern District of Tennessee. The appellee is a public service corporation, chartered for, and engaged in, the business of supplying that city and its inhabitants with water for domestic and other uses. The cause in which the decree was rendered is a suit in equity which was brought by the company on December 7, 1901, against the city to restrain the enforcement of a city ordinance fixing in detail the maximum rates to be charged by the company. This ordinance was enacted on March 30, 1901. The bill contained many allegations, which have become immaterial by the decision of this court in *Knoxville Water Company* v. *Knoxville*, 189 U. S. 434, in which the validity of the ordinance was sustained, except so far as it might confiscate the property of the company by fixing rates so low as to have that effect. The latter contention alone was left open to the company, and to it the remainder of the bill is mainly directed. The allegations in that regard are, that the rates fixed by the ordinance were so low that they denied to the company a reasonable return upon the property employed in the business, and thereby took it for public use without compensation, in violation of the Fourteenth Amendment to

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the Constitution of the United States. After answer by the respondent and replication by the complainant the cause was referred to a special master, whose report was confirmed by the court. The master found and reported that the value of the plant and property employed in the business at the date of the passage of the ordinance was $608,427.95; that the gross income from the company's business was $88,481.39, and that the operating expenses were $34,750.91. The figures of income and expense are those of the fiscal year ending March 31, 1901, and the valuation was made as of that date. The master found and reported that the diminution of income which would have resulted from the enforcement of the ordinance during that fiscal year was $17,623.64, and that the gross income would have been reduced thereby to $70,857.75, leaving a net income of $36,106.84. This net income was less than 6 per cent on the valuation. In the opinion of the master 8 per cent, which included 2 per cent to provide for depreciation, was the minimum net return which the company was entitled to earn. The judge of the Circuit Court, in his opinion confirming the master's report, adopted the master's valuation of the whole plant and property at $608,427.95 (although he held that it ought to be increased by about $3,000.00), and the master's finding that the gross income was $88,481.39; that the expenses were $34,750.91; that the effect of the reduction made by the ordinance would be to lessen the gross income by $17,623.64, and that therefore the net income under the ordinance would be $36,106.84, or about $400.00, less than 6 per cent on the valuation. Upon these assumptions of fact as to its effect the judge regarded the ordinance as confiscatory and issued a permanent injunction against its enforcement.

At the threshold of the consideration of the case the attitude of this court to the facts found below should be defined. Here are findings of fact by a master, confirmed by the court. The company contends that under these circumstances the findings are conclusive in this court, unless they are without support in the evidence or were made under the influence of er-

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roneous views of law. We need not stop to consider what the effect of such findings would be in an ordinary suit in equity. The purpose of this suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an act of the legislature that is attacked, but an ordinance of a municipality. Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. *Prentis* v. *Southern Railway Co.*, 211 U. S. 210; *Honolulu Transit Co.* v. *Hawaii*, 211 U. S. 282. There can be at this day no doubt, on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact the invalidating facts must be proved to the satisfaction of the court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority. It must not be understood that the findings of a master, confirmed by the trial court, are without weight, or that they will not, as a practical question sometimes be regarded as conclusive. All that is intended to be said is, that in cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation. We approach the discussion of the facts in this spirit.

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The first fact essential to the conclusion of the court below is the valuation of the property devoted to the public uses, upon which the company is entitled to earn a return. That valuation ($608,000) must now be considered. It was made up by adding to the appraisement, in minute detail of all the tangible property, the sum of $10,000 for "organization, promotion, etc.," and $60,000 for "going concern." The latter sum we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return. We express no opinion as to the propriety of including these two items in the valuation of the plant, for the purpose for which it is valued in this case, but leave that question to be considered when it necessarily arises. We assume, without deciding, that these items were properly added in this case. The value of the tangible property found by the master is, of course, $608,000 lessened by $70,000, the value attributed to the intangible property, making $538,000. This valuation was determined by the master by ascertaining what it would cost, at the date of the ordinance, to reproduce the existing plant as a new plant. The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to obviously incorrect results, if the cost of reproduction is not diminished by the depreciation which has come from age and use. The company contends that the master, in fixing upon the valuation of the tangible property, did make an allowance for depreciation, but we are unable to agree to this. The master nowhere says that he made allowance for depreciation and the language of his report is inconsistent with such a reduction. The figures which he adopts are those of a "fair contractor's price." The basis of his calculation was the testimony of an opinion witness called by the company. That witness submitted a table, which avowedly showed the cost of reproduction, without allowance for depreciation. The values testified to by him were adopted by the master in the

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great majority of cases. The witness's valuation of the tangible property was somewhat reduced by the master, but the reductions were not based upon the theory of depreciation, but upon a difference of opinion as to the reproduction cost.

The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case. The officers of the company, *alio intuitu*, estimated what they called "incomplete depreciation" of this plant (which we understand to be the depreciation of the surviving parts of it still in use) at $77,000, which is 14 per cent of the master's appraisement of the tangible property. A witness called by the city placed the reproduction value of the tangible property at $363,000, and estimated the allowance that should be made for depreciation at $118,000, or 32 per cent. In the view we take of the case it is not necessary that we should undertake the difficult task of determining exactly how much the master's valuation of the tangible property ought to have been diminished by the depreciation which that property had undergone. It is enough to say that there should have been a considerable diminution, sufficient at least to raise the net income found by the court above 6 per cent upon the whole valuation thus diminished. If, for instance, the master's valuation should be diminished by $50,000, allowed for depreciation, the net earnings found by him would show a return of substantially 6.5 per cent.

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Counsel for the company urge rather faintly that the capitalization of the company ought to have some influence in the case in determining the valuation of the property. It is a sufficient answer to this contention that the capitalization is shown to be considerably in excess of any valuation testified to by any witness, or which can be arrived at by any process of reasoning. The cause for the large variation between the real value of the property and the capitalization in bonds and preferred and common stock is apparent from the testimony. All, or substantially all, the preferred and common stock was issued to contractors for the construction of the plant, and the nominal amount of the stock issued was greatly in excess of the true value of the property furnished by the contracts. A single instance taken from the testimony will illustrate this. At the very start of the enterprise a contract was entered into for the construction of a part of the plant, which was of a value slightly, if at all, exceeding $125,000. The price paid the contractor was $125,000 in bonds and $200,000 in common stock. Other contracts for construction showed a like disproportion between value furnished and nominal capitalization received for that value. It perhaps is unnecessary to say that such contracts were made by the company with persons who, at the time, by stock ownership, controlled its action. Bonds and preferred and common stock issued under such conditions afford neither measure of nor guide to the value of the property.

We think that the master and the court erred in another respect, which might affect in an important way the amount which could have been realized under the operation of the ordinance. This error consisted in the manner of deducting the reductions necessarily made by the ordinance. The evidence in the record is not entirely clear, though, after careful consideration, we think it shows the following state of facts: The company's schedule prescribed certain rates, which we may call the book rates, but upon a large part of them a discount of 5 per cent was made if they were promptly paid. The

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consumers very generally availed themselves of this discount. The discount rates constituted the actual collections, and may be called the actual rates. For the fiscal year which was examined the book rates amounted, in round numbers, to $93,000, while the actual rates amounted, as the master found, to $88,000. The percentage of reduction made by the ordinance was computed to be 22.88. This percentage was ascertained either by comparing the book rates with the ordinance rates, or by comparing the actual rates with the ordinance rates, still further reduced by a 5 per cent discount for prompt payment, which comes to substantially the same result. The fallacy in the process employed by the master consisted in substance in assuming that the ordinance rates would be subject to a discount for prompt payment. The company, it is true, might, if it chose, allow such a discount from the ordinance rates, but the ordinance required no discount from the rates established by it, and the company therefore was bound to offer none. If it stood upon the letter of the ordinance, as it had the right to do, and exacted from the consumers the full charges prescribed by the ordinance, the amount which would have been realized would have been over $4,000 more than that found by the master, or a net income of not less than $40,000. Doubtless, the abandonment of the common method of discount for prompt payment would deprive the company of an efficient aid to the quick collection of its bills, but in the case of a prime necessity like water there are other methods of enforcing prompt payment, though it is not unlikely that the elimination of the discount rate would add somewhat to the cost of collection, and thereby to the operating expenses.

A brief recently filed by the city, to which no reply has been made, seems to show conclusively that there was still another error in ascertaining the amount of reduction effected by the ordinance. What was actually done was to deduct the 22.88 reduction from the actual water rates (excluding hydrant rentals, which were not changed), but of these actual water rates $10,000 came from territory outside of the corporate

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limits, which was not affected by the ordinance. From this $10,000 no percentage should have been deducted. The reduction, therefore, was too large by over $2,000. If this correction should be made, it would amount to nearly four-tenths of one per cent on the capitalization.

We are also of opinion that the master and the court erroneously excluded evidence which had an important bearing upon the true earning capacity of the company under the ordinance. A clear appreciation of this error can be best obtained by a comprehensive review of the hearing. The company's original case was based upon an elaborate analysis of the cost of construction. To arrive at the present value of the plant large deductions were made on account of the depreciation. This depreciation was divided into complete depreciation and incomplete depreciation. The complete depreciation represented that part of the original plant which through destruction or obsolescence had actually perished as useful property. The incomplete depreciation represented the impairment in value of the parts of the plant which remained in existence and were continued in use. It was urgently contended that in fixing upon the value of the plant upon which the company was entitled to earn a reasonable return the amounts of complete and incomplete depreciation should be added to the present value of the surviving parts. The court refused to approve this method, and we think properly refused. A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the

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beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both. If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past.

After the company had closed its case the city undertook to determine the present value of the company's property by the plain method of ascertaining the cost of reproduction, diminished by depreciation. In its case in rebuttal, the company followed the same method, though the results differed largely, and, as we have seen, no proper allowance for depreciation was made. In the course of presenting its case the city offered evidence of the net income of some years subsequent to the passage of the ordinance. The case is peculiar. The company has never observed the ordinance. The suit was begun nine months after its enactment and tried considerably later. In the meantime the company's gross income had largely increased. But the decision in the court below was based solely on the operations of the fiscal year ending March 31, 1901, and the amount of net income ascertained, namely, $36,000, was obtained by applying the reductions made by the

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ordinance to the operations of that fiscal year. We think it was error to confine the investigation to, and base the judgment upon, that year alone. The precise subject of inquiry was, what would be the effect of the ordinance in the future. The operations of the preceding fiscal year, or of any other past fiscal year, were valueless if the year was abnormal, and were only of significance so far as they foretold the future. If, as in this case, sufficient time has passed, so that certainty instead of prophecy can be obtained, the certainty would be preferable to the prophecy. In this case there could be no absolute certainty, because the ordinance had never been put in operation. But evidence of the operations of the years succeeding to the ordinance is relevant and of great importance, and by a consideration of such evidence a much greater degree of certainty could be obtained. Suppose, by way of illustration, that before bringing suit the company had put the ordinance into effect and had observed it for a number of years, and the result showed that a sufficient net income had been realized, is it possible that a suit then could be brought and the evidence confined to a period prior to the ordinance, and by a process of speculation the conclusion reached that the ordinance would be confiscatory? Some evidence regarding the income of the company, after the passage of the ordinance, is in the record, but it subsequently was excluded from consideration. It showed an increase of gross and net earnings, but also an increase in the property devoted to the public use. We are unable to say what the effect of the evidence excluded would be; all we can say is, that the inquiry was unduly limited by the exclusion of the evidence of the operation of subsequent years.

It follows from what has been said that the judgment of the court below cannot stand. There was error in the appraisement of the present value of the plant, in the deduction of the reductions made by the ordinance, and in the exclusion of evidence relating to the operations of the company after the enactment of the ordinance.

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In ordinary cases full justice would be done by reversing the decree and remanding the cause for further proceedings in the court below, there to undergo a new and doubtless prolonged investigation. It is more than seven years since the enactment of the ordinance, and it has never been observed in any respect. This litigation ought now to be ended, if it is possible to end it with due regard to the rights of the contending parties. Disregarding for the moment all the errors which were committed in the court below, the decision of this cause may be rested upon a broader ground, which is clearly indicated by the previous judgments of this court. The jurisdiction which is invoked here ought, as has been said, to be exercised only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States. In *Ex parte Young*, 209 U. S. 123, the last word of caution by this court was said (p. 166): "Finally it is objected that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts." The same thought, in effect, was expressed in *San Diego Land & Town Company* v. *National City*, 174 U. S. 739, 754, "judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property

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taken for the public use." And in *San Diego Land & Town Company* v. *Jasper*, 189 U. S. 439, after repeating with approval this language, it was said (p. 441): "In a case like this we do not feel bound to reëxamine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached."

It cannot be doubted that in a clear case of confiscation it is the right and duty of the court to annul the law. Thus in *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362, where the property was worth more than its capitalization, and upon the admitted facts the rates prescribed would not pay one-half the interest on the bonded debt; in *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578, where the rates prescribed would not even pay operating expenses; in *Smyth* v. *Ames*, 169 U. S. 466, where the rates prescribed left substantially nothing over operating expenses and cost of service; and in *Ex parte Young*, *supra*, where, on the aspect of the case which was before the court, it was not disputed that the rates prescribed were in fact confiscatory, injunctions were severally sustained. But the case before us is not a case of this kind. Upon any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income, in any event, would be substantially 6 per cent, or 4 per cent after an allowance of 2 per cent for depreciation. See *Stanislaus County* v. *San Joaquin Company*, 192 U. S. 201. We cannot know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would

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save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation; the inferences were based upon the operations of the preceding year; and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. The city authorities acted in good faith, and they tried, without success, to obtain from the company a statement of its property, capitalization and earnings.

The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property, and that State or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based.

If hereafter it shall appear, under the actual operation of the

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ordinance, that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the State of Tennessee. But as the case now stands there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation. For these reasons—

The decree is reversed and the case remanded to the court below with directions to dismiss the bill without prejudice.

WILLCOX *et al.*, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF NEW YORK, *v.* CONSOLIDATED GAS COMPANY.

CITY OF NEW YORK *v.* CONSOLIDATED GAS COMPANY OF NEW YORK.

JACKSON, ATTORNEY GENERAL OF THE STATE OF NEW YORK, *v.* CONSOLIDATED GAS COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 396, 397, 398. Argued November 4, 5, 6, 1908.—Decided January 4, 1909.[1]—Opinion filed January 12, 1909.

It is not a question of discretion or comity for the Federal court to take jurisdiction of a case; it is the duty of that court to take jurisdiction when properly appealed to; and it should not be criticized for so doing even though the case be one of local interest. *Cohens* v. *Virginia*, 6 Wheat. 264, 404. The right of a party plaintiff to choose the

[1] On January 4, 1909, MR. JUSTICE PECKHAM made the following announcement:

First. At the time of the consolidation, the value of the franchises of the constituent companies was fixed by them at $7,781,000 and that amount formed part of the capital of the complainant for which it

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Federal court cannot be properly denied. *Re Metropolitan Receivership*, 208 U. S. 90, 110.

Rates, when fixed by legislative authority, for public service corporations, should allow a fair return upon the reasonable value of the property at the time it is being used, but the legislative act will not be

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issued stock. The consolidation was effected pursuant to the state statute and the State has never questioned the validity or fairness of the valuation. Since the consolidation the stock so issued has been dealt in up to the present time as valid stock of the consolidated company, capitalized pursuant to the statute at not more than the fair aggregate value of the property, franchises and rights of its constituent companies. The State should not now be heard to question the value of the franchises at the time of the consolidation. The method of arriving at the value of these kinds of franchises, and how they should generally be tested in the fixing of rates, are questions not now before the court and are left undecided. The case before the court is decided upon its own peculiar facts.

Second. The estimated increase in the value of these franchises as made by the trial court at the time of the commencement of this suit is only an estimate and is not based upon evidence sufficient to warrant the finding of any increase whatever over the amount agreed upon at the consolidation.

Third. The evidence leaves it in doubt whether the value of the property used by the company in its business is as great as found by the trial court after reducing the value of the franchises to the sum agreed upon at consolidation.

Fourth. But taking the value as found by the court, after reducing the value of the franchises the result gives a return of almost 5½ per cent. A reduction in the value of the real estate, plants, etc., of a small amount only would bring the return to, if not more than 6 per cent. A possible increased consumption of gas would probably increase the earning of the company without a corresponding increase of cost. Under all the circumstances the complainant has failed to make out its case with that degree of clearness necessary to warrant the interference of a court of equity before an actual and *bona fide* test has been made under the practical operation of supplying gas at the rates mentioned in the statutes.

Fifth. There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality. In this particular case with reference to the risk attending the business and the locality where it is carried on, the complainant

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decla d invalid by the courts unless the rates are so unreasonably low that their enforcement would amount to taking the property for public use without compensation. *San Diego Land and Town Co. Cases*, 174 U. S. 739; 189 U. S. 439.

Except in very clear cases, courts should not interfere with state rate

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is entitled to a return, if it is possible, of 6 per cent upon the fair value of its property actually used in its business of supplying gas.

Sixth. There is no discrimination between the individual consumer and the city, by fixing the price of gas for the city at five cents per thousand cubic feet less than is permitted in the case of individual consumers, so far at least as the complainant is concerned. If the amount obtained from the total gas sold to the city and the individual is enough to secure the requisite return upon the property, it is all the complainant can require and the question of discrimination between city and individual is one in which the complainant can have no interest.

Seventh. The rate proposed must be with reference to the value of the property at the time when the rate takes effect. The company is entitled to the benefit of any increase in value at that time. This at least is the general rule, and if there be any exception to the rule, this case does not come within it.

Eighth. Any increased expense arising from the increased candle power of the light demanded by the statutes, was included substantially in the expenses of the year (1905) with reference to which the inquiry was made.

Ninth. The provision in the acts requiring a certain pressure is unconstitutional. The proof unquestionably shows great possible if not probable danger of explosion in the mains or other pipes, if the pressure demanded were applied to them as they now are. To eliminate such danger would require strengthening all the mains and other pipes, which would involve an expenditure of many millions of dollars upon which no return could be obtained at the rates prescribed by the acts. The provision can be separated, however, from the rest of the statute and the balance thereof made valid. The pressure must be sufficient to produce a light of the candle power mentioned in the acts.

Tenth. If the court below is right in its construction of the penalties, as to their amount, etc., such penalties are void, but are separable from the rest of the acts and the balance can be effectually carried out.

Eleventh. This is not a case for the valuation of good will. The complainant has in fact a substantial monopoly of the gas business in the city of New York and those who wish to use gas must take it from complainant. In this case, as there is no possibility of competition there should be no allowance for good will.

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legislation before the legislation goes into effect. *Knoxville* v. *Water Co.*, *ante*, p. 1.

Value of the property employed being an essential element in determining whether a rate is or is not confiscatory, and being also largely a matter of opinion, where the determination of the question depends upon such value, a court of equity should hesitate to interfere by injunction to suspend the rate before it goes into operation and a fair trial has been made.

Franchises of public service corporations are property and cannot be taken or used by others without compensation, and, where a State has by legislative enactment permitted such corporations to capitalize such franchises, their value at the time of such capitalization should be included in the value of the property as an element for fixing rates; but no increased value of such franchises should be allowed.

Public service corporations, such as gas companies, are subject to the legislative right to fix rates which permit not more than a fair return on the property used.

Whether a rate yields such a fair return as not to be confiscatory depends upon circumstances, locality and risk, and no particular rate can be established for all cases.

Under all the circumstances of this case this court concurs with the court below that six per cent is a fair return on the value of property employed in supplying gas in the city of New York, and a rate yielding that return is not confiscatory.

In estimating value of franchises for the purpose of fixing rates, it is immaterial that the corporation is taxed on a greater value than that allowed if it charges its taxes as operating expenses in determining net income.

Where a public service corporation has a monopoly, such as of supplying gas in a large city, "good will" cannot be considered as an element of value of the property employed.

For purpose of fixing rates the value of property employed should be determined as of the time when the inquiry is made, and, as a general rule, the corporation is entitled to the benefit of increased value since acquisition.

Twelfth. As it may possibly be that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair and just return upon its property used in its business of supplying gas, the complainant, in that event, ought to have the opportunity of again presenting its case to the court. Therefore the decree is reversed with directions to dismiss the bill without prejudice.

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A provision in a state statute, requiring a public service corporation to perform its service in such a manner that its entire plant would have to be rebuilt at a cost on which no return could be obtained at the rate fixed, deprives the company of its ability to secure such return and is unconstitutional and void.

Ex parte Young, 209 U. S. 123, followed as to the unconstitutionality of provisions in a state statute for penalties for violations so enormous as to be overwhelming.

Provisions in a gas rate bill for rate, pressure and penalties for violation, may be, as held in this case, separable and the unconstitutionality of the provisions as to pressure and penalties will not affect the provisions as to rate.

Provision in a gas rate act establishing one rate for the municipality and another for individual consumers is not an unreasonable classification and does not render the act unconstitutional under the equal protection clause of the Fourteenth Amendment.

Where none of the different classes of consumers complain of different rates the corporation cannot complain of such differences provided the total receipts are sufficient to yield an adequate return.

Where, as in this case, in an action brought before the rate takes effect, complainant fails to sustain the burden of clearly showing that a rate act is confiscatory, the bill should be dismissed without prejudice to right of the complainant to bring another action after the rate goes into effect if it then proves to be confiscatory.

So held in regard to the New York Eighty-Cent Gas Law.

157 Fed. Rep. 849, reversed.

THE appellee, complainant below, filed its bill May 1, 1906, in the United States Circuit Court for the Southern District of New York against the city of New York, the Attorney General of the State, the District Attorney of New York County and the Gas Commission of the State, to enjoin the enforcement of certain acts of the legislature of the State, as well as of an order made by the Gas Commission, February 23, 1906, to take effect May 1, 1906, relative to rates for gas in New York City.

Since the commencement of the suit the Gas Commission has been abolished and the Public Service Commission has been created by the legislature in its stead. The official term of Attorney General Mayer has also expired, and Attorney General Jackson, his successor, has been substituted in his place.

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The ground for the relief asked for in the bill was the alleged unconstitutionality of the acts and the order, because the rates fixed were so low as to be confiscatory. Upon filing the bill a preliminary injunction was granted (146 Fed. Rep. 150), and after issue was joined the case was referred to one of the standing masters of the court to take testimony, in conformity to the practice indicated in *Railroad* v. *Tompkins*, 176 U. S. 167, 179.

A hearing was had before the master, who reported in favor of the complainant. The case then came before the Circuit Court, and, after argument, a final decree was entered, restraining defendants from enforcing the provisions of the acts and the order relating to rates or penalties. 157 Fed. Rep. 849. These various defendants, except the District Attorney, have taken separate appeals directly to this court from the decree so entered. The acts which are declared void as unconstitutional are chapter 736 of the Laws of 1905, which limits the price of gas sold to the city of New York to a sum not to exceed 75 cents per thousand cubic feet. The act also requires that the gas sold shall have a specified illuminating power, and a certain pressure at all distances from the place of manufacture. Penalties are attached to a violation of the act. The other act is chapter 125 of the Laws of 1906, limiting the prices of gas in the boroughs of Manhattan and the Bronx, to other consumers than the city of New York, to 80 cents per thousand cubic feet, with like penalties as in the act of 1905, and with the same provisions as to illuminating power and the pressure in the service mains. The order which was declared invalid was one made by the Gas Commission created under and by virtue of chapter 737 of the Laws of 1905, the order providing that the price of gas in the city should be not more than 80 cents to consumers other than the city of New York. The order had the same provisions as to illuminating power and pressure as the acts above mentioned. The master and the court below found that the 80-cent rate was so low as to amount to confiscation, and hence the acts and the order were invalid as in violation of the Federal Constitution.

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Mr. Edward B. Whitney, with whom *Mr. George S. Coleman* was on the brief, for appellants Willcox *et al.*:

A simple allegation that a statute is unconstitutional is no exception to the rule that equity can only be resorted to when there is no adequate remedy at law. *Cruickshank* v. *Bidwell*, 176 U. S. 73; *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681, 684. The suit cannot be maintained on the ground that it prevents multiplicity of actions, since no representative consumers were made parties, as in *Ex parte Young*, 209 U. S. 123, 129. See *Richman* v. *Consolidated Gas Co.*, 114 N. Y. App. Div. 216, 224; *S. C.*, 186 N. Y. 409. A statute should never if possible be construed so as to be unconstitutional or absurd. *Oates* v. *National Bank*, 100 U. S. 244; *Grenada County* v. *Brogden*, 112 U. S. 268. Penalty laws are strictly construed. *France* v. *United States*, 164 U. S. 676, 682; *Bolles* v. *Outing Co.*, 175 U. S. 262, 265; *United States* v. *One Bay Horse*, 128 Fed. Rep. 207. The penalty clause in this act was not properly construed by the court below, but as properly construed is reasonable. *Cox* v. *Paul*, 175 N. Y. 328; *Griffin* v. *Interurban Street Railway Co.*, 179 N. Y. 438, 448–449; *S. C.*, 180 N. Y. 538; see cases cited in *In re Snow*, 120 U. S. 286; *United States* v. *Patty*, 2 Fed. Rep. 664; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 77; *United States* v. *Eagan*, 30 Fed. Rep. 498; *Taft* v. *Stephens Lithographic Co.*, 38 Fed. Rep. 28; *Creeps* v. *Durden*, Cowp. 640; *Central R. R. Co.* v. *Green*, 86 Pa. St. 427. Assuming equity to have had jurisdiction, it should have been declined and the controversy remitted to the state courts.

The 75-cent rate as to the city is not an unconstitutional discrimination. On the contrary, since the 75-cent statute was passed in 1905, and under it the complainant could still earn nearly ten per cent according to the Circuit Court figures, it was valid when enacted, and therefore could not be made invalid by the passage of a subsequent law, even if the latter were unconstitutional.

Under the rule laid down in *Sweet* v. *Rechel*, 159 U. S. 380,

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392 (derived from *Wellington, Petitioners*, 16 Pick. 87, 96–97, and *Talbot* v. *Hudson*, 16 Gray, 417, 422), and the test laid down in *San Diego Land Co.* v. *Jasper*, 189 U. S. 439, 441–442, as between two unimpeached and qualified expert witnesses, the valuations most favorable to defendant must be adopted; a statute cannot be declared unconstitutional upon testimony of experts or employés (see *Chicago & Grand Trunk Railway Co.* v. *Wellman*, 143 U. S. 339), unless the State admits its correctness; complainant is entitled to no higher valuations than those which it has itself fixed under oath; and items incapable of exact valuation must be put down at the minimum amount that a fair minded state court could fix. At least as to all items of capitalization over and above the actual cost of the property, the test must be this: Is it logical or equitable that the consumer should pay more cents per thousand cubic feet of the gas he burns because of the inclusion of this item?

The period to which attention must be directed is the month of May, 1906, when the suit was begun. If conditions thereafter change, the remedy is under *Smyth* v. *Ames*, 169 U. S. 466, 549–550.

The basis of valuation of the land occupied by complainant's plants should not exceed its cost to the company. Of two gas companies, long established in the same community, neither should be permitted to charge a higher rate than the other to its consumers for the sole reason that, on account of movements of population uninfluenced by either company, the site of its plant would be the more valuable if vacated and sold. The fortunate company is entitled to obtain full value of the land when sold, but meanwhile the unrealized profit does not represent profit used in the manufacture and distribution of gas; it represents wealth which the manufacture and distribution of gas keeps out of use. But if the basis of valuation is to exceed the cost of the land it should still not exceed the estimated cost of replacing it with other land capable of accomplishing the same result.

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The manufacturing plants should be valued not at what it would cost to reproduce them as they stand, but at what it would cost to produce a modern construction which could do the same amount of work. The complainant is estopped from disputing in such a case as this the valuation which it has itself given to the state tax officers and investigating committee.

The complainant is not entitled to any allowance of increased value over original cost of the pipes in the streets, due to the fact that the streets have been repaved with money raised by assessments upon the consumers, complainant being excused under the state law from paying assessments.

A franchise with, is to be distinguished from a franchise without, the right to charge a minimum toll or earn a minimum dividend. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, belongs to the latter class (see original record in that case, pp. 33, 39, 50, 53, and brief for appellee therein). A revocable franchise is not entitled to be valued at a substantial sum. *Kingsland* v. *The Mayor*, 110 N. Y. 569, 583. The franchises claimed by complainant are either unconstitutional, or not complainant's property, or revocable immediately or upon short notice. Moreover, a franchise to build and operate, without any special contract guaranteeing a minimum rate, has no value cognizable in rate-making or condemnation proceedings except that it gives the company the valuable right to have its tangible assets valued as portions of a profitable going concern, instead of merely as a job lot of secondhand material. See *People ex rel. Metropolitan Street Railway Co.* v. *Tax Commissioners*, 174 N. Y. 417; *Brunswick Water District* v. *Maine Water Co.*, 99 Maine, 371, 375-381. Such a franchise must be construed as having been granted subject to the fixing of a reasonable maximum rate. There is an implied understanding that the tolls shall be high enough to give the company a fair return. A fair return on what? What would counsel advise a proposed purchaser about it, the day after the company opened for business? According to our contention it would be calculated upon the capital in-

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vested. Moreover, the State can at any time authorize or direct the city to build its own lighting plant. If this be done, the company must drop its claim for a profit on its alleged franchise or lose all its customers. *Skaneateles Water Case*, 161 N. Y. 154; *S. C.*, 184 U. S. 354, and the *Newburyport Cases*, 168 Massachusetts, 541, 555; 103 Fed. Rep. 584; 193 U. S. 561.

The basis of the maximum rate regulation should not be a figure exceeding the capital actually invested. At the time of the granting of the franchise the implied understanding is that a reasonable return will be allowed upon the capital invested, in view of the special risk of the enterprise. If assured that the public will protect him to the extent of allowing him to make, if successful, a profit upon that investment proportionate to that risk, the investor will take it.

As to the rate of return, it has been already decided that six per cent, including an allowance for depreciation, is sufficient. *San Diego Co.* v. *Jasper*, 189 U. S. 439, 446. But it is submitted that property is not taken under the Fourteenth Amendment if the owner is allowed, over and above a proper contingent fund, a sum sufficient to cover the elements known in political economy as interest on capital and wages of superintendence; the element of insurance against the special risks of the business not being protected by the Fourteenth Amendment, but one as to which the responsibility is upon the State. Mill's Political Economy, Book I, Ch. 15, § 1; J. L. Laughlin's Elements of Political Economy, ed. 1902, pp. 202, 206; Marshall's Principles of Economy, Book VI, Ch. 6, §§ 4, 5. If complainant is entitled to six per cent upon any part of its investment, it is not so entitled as to the whole of the investment; for companies so situated could borrow in ordinary times at considerably lower rate to the extent of half the tangible property, nor is there evidence justifying the return at any particular rate upon the franchise item.

The bill should be dismissed because the experience of the other companies doing business in the same territory, as well

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as of this complainant, should have been shown. If one of two companies doing business in the same territory can make a reasonable profit at the statutory rate, then that rate is constitutional as to both companies, since to apply it to that company alone would violate its rights under the Fourteenth Amendment. See *Gill Case*, 156 U. S. 657; *Cotting Case*, 183 U. S. 114. Applying the same rate to the company less well equipped would not violate its rights, although it might force reconstruction, temporarily cutting off any return. *Moeschen* v. *Tenement House Department*, 89 N. Y. App. Div. 526, 538; 179 N. Y. 325, 330; 203 U. S. 583.

Assuming that an injunction were proper in this case, it should have been conditioned upon complainant's reducing its charge for gas to whatever sum would be deemed constitutional. 1 Pomeroy's Eq. Jurispr., §§ 385–386, 389, 393; *De Walsh* v. *Braman*, 160 Illinois, 415, 420; see also *Veazie* v. *Williams*, 8 How. 134, 161; *Willard* v. *Tayloe*, 8 Wall. 557, 567; *People's Bank* v. *Marye*, 191 U. S. 272, 281, 285, and cases cited; *S. C.*, 3 Dill. 19, 34; *Farmers' Loan & Trust Co.* v. *Denver Co.*, 126 Fed. Rep. 46, 51; *Thomas* v. *Evans*, 105 N. Y. 601, 615; *Fanning* v. *Dunham*, 5 Johns. Ch. 122, 142, and cases cited; *Stanly* v. *Gadsby*, 10 Pet. 521; *Tiffany* v. *Boatman's Inst.*, 18 Wall. 375, 385; *Knoth* v. *Manhattan Railway Cot*, 109 App. Div. 802, 807, affirmed 187 N. Y. 243.

Mr. Alton B. Parker, with whom *Mr. Francis K. Pendleton* and *Mr. William P. Burr* were on the brief, for the city of New York, appellant in No. 397:

The court below erred in assigning to the franchises acquired by the appellee under the consolidation agreement a money value as part of the investment on which it is entitled to a return. It was solely on the finding by the court of a value of $12,000,000 for these franchises that the court decreed the enactments to be unconstitutional in respect of the rates fixed. Whatever monetary value might, for any purpose, be assigned to these franchises, it disappears when the rate of charge for

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service is so reduced as to yield no more than a fair and reasonable return on the investment in the means employed in rendering the service; the court having found $47,831,435 as the value of the tangible assets employed by the appellee, and six per cent to be a reasonable return, and that the return the appellee would probably realize at the reduced rate would be $3,024,592.45, which is more than six per cent on the valuation so found—the court erred in adding to that valuation $12,000,000 for franchises, thus increasing the investment to $59,831,435, on which the probable return would be less than six per cent, though the return would even then be reasonable.

The court below erred in assigning to the tangible assets any value in excess of their original cost to the constituent corporations of the appellee and the cost of any additions thereto since 1884, the time of consolidation. The entire cost of the real estate employed in its business by the appellee was only $4,118,267.38 as against $11,985,435 allowed by the decree, being a difference of $7,867,167.62, which, being deducted from the total valuation of $47,831,435, would reduce that total to $39,964,268.38, on which the return of $3,024,592.45 would be more than seven per cent. Further, if the valuation for franchises be excluded, whether we take original cost to constituent corporations, or appraised valuation by the constituent corporations in 1884 for the purposes of consolidation and additions thereto since then, or even present values as found by the master and approved by the court, the result is the same; the net return of $3,024,592.45 exceeds six per centum; when the item franchises, valued by the corporations in 1884 at $7,781,000, and not separately valued by the master, but increased by the court, through a process of reasoning, to $12,000,000 is added that even then the return is over five per centum. And further, $5,555,761.63 has been unwarrantably added for reproductive cost of mains and services and deducting this sum and the excessive allowance for real estate from the total found by the court, the

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return to the appellee on its investment would be more than eight per cent.

The return of six per cent adopted by the court, is more than a fair return to the appellee, that is more than is usually obtained or expected from equally safe investments.

The finding of the court as to the impossibility of the appellee fulfilling the requirement as to pressure in its mains is predicated of the erroneous valuations of the property of the appellee, and these being corrected the appellee would be able to make the requisite changes and still have a fair return; and the requirement is separable from the other provisions.

The legislation complained of is not unjustly discriminatory; the discrimination is just and reasonable, the city standing in the relation of a wholesale consumer or buyer; the cost of supplying the city is greatly less than the cost of supplying other consumers; and the difference of five cents per thousand feet in favor of the city when spread over the entire sales of the appellee results in a difference of only fifteen one-hundreths of a cent per thousand feet in favor of the city.

The appellee has an adequate defense at law against proceedings to enforce performance of any of the provisions of the statute, if they are not enforcible, and, by injunction, against the separable provisions for penalties.

Mr. William S. Jackson, Attorney General of the State of New York, for appellant in No. 398:

The evidence fails to show that it was impossible for the legislature fair-mindedly to come to the results reached.

The legislative acts were based upon evidence presented by complainant.

The legislative acts were invalidated by improper methods of valuation, involving property not entitled to a return, gross over-valuations and duplications. For purposes of rate regulation, neither franchise nor good-will can be valued separately from tangible property. The valuation of franchises and good-will would nullify the State's power to reduce rates

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once established. But that power has been upheld by this court in *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 213, 214.

The owner is entitled to a return only upon the fair value of the property necessary for the particular use. *Covington & Lexington Co.* v. *Sandford*, 164 U. S. 578. For there may "have been extravagant and needless expenditure of money" in construction; it may have been invested in a plant "unwisely built." *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; "it may have been invested in property that cost more than it should have cost." *San Diego L. & T. Co.* v. *National City*, 174 U. S. 739. "Great mistakes of construction, even though honest, may have been made, which unnecessarily enhance the cost; more property may have been acquired than necessary and needful for the purpose intended." *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 201; and "reckless and unnecessary expenditures, not legitimately incurred in the acquisition, construction or preservation of so much of the plant as is necessary for the purpose, may have been made." *San Diego City Co.* v. *City of San Diego*, 62 Am. St. Rep. 273. The question of reasonableness of a rate involves the element of reasonableness both as regards the company and as regards the public. *Chicago &c. R. R.* v. *Minnesota*, 134 U. S. 450; *Turnpike Co.* v. *Sandford*, 164 U. S. 578.

The rate fixed must be just to the public as well as to the public service corporation. *San Diego Land Co.* v. *National City*, 174 U. S. 757; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 442; *Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 546.

The State has the right to secure to the public the benefits of the advancement in the particular science affected by the law, and its power so to do is not to be restricted by the employment of obsolete apparatus or the use of methods which that particular science has long since discarded. *Gill Case*, 156 U. S. 657.

The 80-cent rate will be held to yield complainant a fair

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return unless it is plainly and palpably confiscatory. *Chicago &c.* v. *Wellman*, 143 U. S. 339, 444; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391; *Smyth* v. *Ames*, 169 U. S. 466, 529; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614, 615; *San Diego Land Co.* v. *National City*, 174 U. S. 739, 754; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439; *Ball* v. *Rutland R. R. Co.*, 93 Fed. Rep. 19; *Palatka Waterworks* v. *Palatka*, 127 Fed. Rep. 161.

The maximum rate fixed by chapter 125 of the Laws of 1906, will permit complainant to earn a fair return upon the property employed by it in its gas business.

A statute which permits a public service corporation to earn a return of five and five-tenths (5.5) per cent per annum upon investment in constantly appreciating realty, in plant and property in the streets protected against depreciation, and upon intangible property, which is constantly appreciating in value, does not constitute confiscation of that property.

The provisions as to candle power, pressure and penalties do not invalidate the acts and they are separable. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 394–396; *Consolidated Gas Co.* v. *Mayer*, 146 Fed. Rep. 155.

The eleven-cent allowance by the court was excessive.

We submit that all this allowance in excess of 7.70 cents for current repairs and replacements is excessive. The 7.70-cent charge keeps the plant at all times presently efficient. The average for twenty years has been 10.89 cents, and the development of the capacity under that average shows that it was much more than necessary for the purpose now pretended. *Cedar Rapids Water Co.* v. *Cedar Rapids*, 199 U. S. 600.

Mr. James M. Beck, Mr. John A. Garver and *Mr. Charles F. Matthewson* for appellee:

Mr. Beck: In the statutes here in question the provisions as to pressure are unconstitutional, and invalidate both statutes. The undisputed and indisputable conclusions from the testimony upon this point are:

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Assuming that compliance with the pressure provisions was at all practicable, it would involve the expenditure of at least $4,000,000, a substantial increase in operating charges and a reconstruction of the company's distributing system throughout the city; such compliance was physically impossible before the act became operative and the penalties for non-compliance accrued; nor could such increased fixed charges and operating expenses be incurred under the eighty-cent gas rate, and leave a fair return.

The penalties for failure to comply would aggregate at $5,000 per day, $1,800,000 per year under complainant's distributing system as now existing and in operation.

The subjects of price, quality and pressure are so interwoven in these statutes that the requirements as to pressure cannot be severed from the other provisions so that the court can reasonably believe that the legislature would have enacted the provisions as to price and candle power with the provision as to pressure eliminated, and this being so, the whole scheme of legislation is invalidated. The legislative history of the statutes plainly shows the interdependence of the provisions.

This court is under no obligation to determine for the legislature which of two impossible alternatives is to be eliminated. *Non constat* that the legislature may not prefer to retain the old maximum price of $1 to enable the complainant to reconstruct its plant; *non constat* that it may not prefer to repeal the provisions as to pressure in order that the price of gas may be reduced.

The cases cited by counsel for appellants upon the question of severability do not sustain their contentions. *Pollock* v. *Loan Co.*, 158 U. S. 601; *Employer's Liability Cases*, 207 U. S. 463, 501; *Field* v. *Clark*, 143 U. S. 649; *McPherson* v. *Blacker*, 146 U. S. 1; *Baldwin* v. *Franks*, 120 U. S. 685; *Huntington* v. *Worthing*, 120 U. S. 97; *Allen* v. *Louisiana*, 103 U. S. 80, discussed and distinguished.

The severability of different portions of a statute is a question of construction, and in this case a New York statute

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should be construed by New York decisions under which the pressure provision is not severable from the body of the statute. See *People* v. *Porter*, 90 N. Y. 68; *Trustees Saratoga Springs* v. *Gas Co.*, 191 N. Y. 123.

The provisions of said acts as to penalties are unconstitutional on their face and invalidate both statutes. Such penalties operate as a denial of the equal protection of the laws. *Cotting* v. *Stockyards Co.*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123; *Chicago Ry. Co.* v. *Minnesota*, 134 U. S. 418.

Both statutes are unduly discriminatory, and therefore unconstitutional upon their face.

This corporation has, as every one has, the liberty of contract guaranteed by the Fourteenth Amendment. *Lochner* v. *New York*, 198 U. S. 53; *Allgeyer* v. *Louisiana*, 165 U. S. 589. The State, therefore, has no general and unlimited right to interfere between the producer and the consumer as to the price upon which they would otherwise mutually agree, and while, as to public utility corporations the supervisory power of the State, subject to the guarantees of the Constitution, has been recognized since *Munn* v. *Illinois*, yet the State, when it seeks to interfere with the rights of property and the liberty of the citizen to contract for the sale of the products of his labor, only has power to prevent extortion by maximum charges of general and uniform application.

Under the police power to regulate rates, the State is without power to direct a public utility corporation to sell to one customer at a less price than to another. Its power to step between the public service corporation and its customers is exhausted when it fixes a general and uniform maximum price for the public service. *Lake Shore R. R. Co.* v. *Smith*, 173 U. S. 684. See also *Wilson* v. *United Traction Co.*, 72 App. Div. 233; *Beardsley* v. *Railroad Co.*, 162 N. Y. 230.

The rate fixing power is one of prohibition. In strictness, it does not fix rates, but simply provides that any sum beyond a given maximum is unreasonable. In so doing, it in effect declares that the maximum is a reasonable price. *Brooklyn*

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Union Gas Co. v. *New York*, 188 N. Y. 334; *Lake Shore Ry. Co.* v. *Smith*, 173 U. S. 684, 695.

When, therefore, the State provides that as to all other consumers, 80 cents per thousand feet is a reasonable charge, and provides that, as to one consumer, no greater charge than 75 cents shall be made, it in effect declares that to the favored consumer gas must be sold at less than a reasonable rate. This the State cannot do.

The finding of the Circuit Court that the rates prescribed would yield the complainant less than a just and reasonable rate of return is a finding of fact and not a conclusion of law, and this court should therefore give to such finding the controlling weight of a special verdict of a jury and not reverse such finding except for clear and indubitable error. *Turnpike Co.* v. *Kentucky*, 164 U. S. 578; *C., M. & St. P. R. R. Co.* v. *Tompkins*, 176 U. S. 167; *Davis* v. *Schwartz*, 155 U. S. 631, 636; 1 Foster's Fed. Prac., § 315, p. 690; *Green* v. *Bishop*, 1 Cliff. 186, 194; *Mason* v. *Crosby*, 3 Woodb. & Minn. 258, 269; *Donnell* v. *Columbia Ins. Co.*, 2 Sumn. 366, 371; *Welling* v. *La Bau*, 34 Fed. Rep. 40; *Moline Plow Co.* v. *Carson*, 72 Fed. Rep. 387, 388; *Fidelity &c. Co.* v. *St. Matthew's Savings Bank*, 104 Fed. Rep. 858, 860; *Paddock* v. *Commercial Ins. Co.*, 104 Massachusetts, 521, 531; *Richards* v. *Todd*, 127 Massachusetts, 167, 172; *Penna. R. R. Co.* v. *Philadelphia County*, 220 Pa. St. 100.

The Fourteenth Amendment invalidates a rate if it yield less than just remuneration, even though it yield some return. *Cotting* v. *Stockyards Co.*, 183 U. S. 91; *Railroad Commission Cases*, 116 U. S. 307; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326; *Munn* v. *Illinois* (dissenting opinion of Field, J.), 94 U. S. 141; *Chicago R. R. Co.* v. *Minnesota*, 134 U. S. 418, 458; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 397; *Smyth* v. *Ames*, 169 U. S. 466; *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Minneapolis R. R. Co.* v. *Minnesota*, 186 U. S. 257; *Atlantic Coast Line R. R. Co.* v. *N. C. Corp. Com.*, 206 U. S. 1.

A composite statement of this court, therefore, is that legis-

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lative rates, to be constitutional, must yield a "compensation" that is "full," "fair," "just," "reasonable" and "adequate" and one that is not less than the "market value" of such use.

The rule that the fair return must not be less than the legal rate of interest is justified on reason and authority. *Brunswick Water District* v. *Maine Water Co.*, Beale and Wyman on R. R. Rate Regulation, § 401; *Brymer* v. *Water Co.*, 179 Pa. St. 251; *Pennsylvania R. R. Co.* v. *Philadelphia County*, 220 Pa. St. 100, 115; *Chicago Union Traction Co.* v. *State*, 114 Fed. Rep. 557, 561; *Louisville Ry. Co.* v. *Brown*, 123 Fed. Rep. 946; *Central R. R. of Ga.* v. *Alabama*, 161 Fed. Rep. 925; *Milwaukee Ry. & Light Co.* v. *Milwaukee*, 87 Fed. Rep. 577; *Southern Pacific R. R. Co.* v. *Commonwealth*, 78 Fed. Rep. 236; *Spring Valley Water Works* v. *San Francisco*, 124 Fed. Rep. 598; *Bridge Co.* v. *Canada Southern Ry.*, 7 Ont. App. 226.

The basis of calculation should be the present value of the property and not its original cost. *San Diego Land Co.* v. *National City*, 174 U. S. 739, 757; *Cotting* v. *Stockyards Co.*, 183 U. S. 79, 91; *Smyth* v. *Ames*, 169 U. S. 547; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439, 442; *Stanislaus County* v. *Irrigation Co.*, 192 U. S. 201, 215; *Cotting* v. *Kansas City Stockyards Co.*, 82 Fed. Rep. 850, 854.

Mr. Garver: Special franchises must be included among the assets upon which the company is entitled to a return. The special franchises which are involved in the case at bar are the identical franchises which were under consideration by this court in the Special Franchise Tax Cases. *Metropolitan Street Ry. Co.* v. *New York*, 199 U. S. 1, affirming 174 N. Y. 417; *Consolidated Gas Co.* v. *New York*, 199 U. S. 53.

The law of New York controls as to nature of special franchises. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 205, 207; *Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544; *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, 509.

In New York, special franchises are property in the fullest sense. *Sixth Ave. R. Co.* v. *Kerr*, 72 N. Y. 330; *People* v. *O'Brien*,

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111 N. Y. 1, 40; *Suburban Rapid Transit Co.* v. *New York*, 128 N. Y. 510, 520; *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 532; *Parker* v. *Elmira, C. & N. R. Co.*, 165 N. Y. 274; *People* v. *Tax Commissioners*, 174 N. Y. 417, 437; *Matter of White Plains Commissioners*, 176 N. Y. 239; *Matter of Long Acre El. L. & P. Co.*, 188 N. Y. 361; *Hatfield* v. *Straus*, 189 N. Y. 208, 219; *Coney Island &c. R. Co.* v. *Kennedy*, 15 App. Div. 588, 592; *Rochester &c. Turnpike Road Co.* v. *Joel*, 41 App. Div. 43, 45; *Wakefield* v. *Village of Theresa*, 125 App. Div. 38.

A corporation cannot be deprived of its special franchises, except under the power of eminent domain and upon payment of their full value. *Sixth Ave. R. Co.* v. *Kerr*, 72 N. Y. 330; *Matter of White Plains Commissioners*, 176 N. Y. 239; *Coney Island &c. R. Co.* v. *Kennedy*, 15 App. Div. 588, 592; *Spring Valley Water Works* v. *San Francisco*, 124 Fed. Rep. 574; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312.

While the point has not been directly passed upon by this court, yet, wherever it has been referred to in the general discussion of the subject of rate regulation, it has been stated or assumed that, in fixing a rate, the value of the special franchises must be included in valuing the property of a public service corporation. *Smyth* v. *Ames*, 169 U. S. 466; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Chicago &c. Ry. Co.* v. *Tompkins*, 176 U. S. 167; *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368.

In addition to the fact that these franchises are regarded as "property in the highest sense," in New York there are some special considerations which would make it peculiarly flagrant for the legislature of that State to disregard them, in establishing a maximum rate for a public service corporation, and particularly for the appellee. *People* v. *O'Brien*, 111 N. Y. 1, 40.

In New York, special franchises are assessed for the purposes of taxation, under a special statute passed for that purpose. Laws 1899, Ch. 412; *People* v. *Tax Commissioners*, 174 N. Y.

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417, 437. The right to capitalize special franchises has been recognized by the law of New York. Laws 1907, Ch. 429, §§ 55, 69. The capitalization of special franchises was expressly sanctioned in 1884. Laws 1884, Ch. 367.

An unconditional grant by a State constitutes a contract, which is entitled to protection under the Constitution just as fully as a grant made by an individual. *Fletcher* v. *Peck*, 6 Cranch, 87; *Sinking Fund Cases*, 99 U. S. 700, 719; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674, 681; *People* v. *O'Brien*, 111 N. Y. 1.

Good will should have been included among the assets upon the value of which the company was entitled to a return. Good will is a valuable property right, growing out of the successful establishment of a business, over and above the actual capital invested and employed in the business. *Franchises Tax Cases*, 174 N. Y. 417, 424; *Gue* v. *Tidewater Canal Co.*, 24 How. 261; *State R. R. Tax Cases*, 92 U. S. 575, 606; *Slater* v. *Slater*, 175 N. Y. 143; *Matter of White Plains Commissioners*, 176 N. Y. 239; *People* v. *Roberts*, 154 N. Y. 101; *Cleveland &c. Ry. Co.* v. *Backus*, 154 U. S. 439; *Express Company Cases*, 166 U. S. 171, 185; *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S. 412; *Fargo* v. *Hart*, 193 U. S. 490; *San Francisco Bank* v. *Dodge*, 197 U. S. 70.

Mr. Matthewson dealt exclusively with the facts in the cases.

By leave of court, *Mr. W. Bourke Cockran*, representing certain interested parties, and *Mr. Nathan Matthews*, representing the complainant in the case of *Haverhill Gas Light Company* v. *Barker*, pending in U. S. Circuit Court for the District of Massachusetts, filed briefs herein, as *amici curiæ*.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated

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by counsel for the appellants, the Public Service Commission, in their brief in this court. They assume to criticise that court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens* v. *Virginia*, 6 Wheat. 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different States or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied. *In re Metropolitan Railway Receivership*, 208 U. S. 90–110; *Prentis* v. *Atlantic Coast Line et al.*, 211 U. S. 210. In the latter case it was said that a plaintiff could not be forbidden to try the facts upon which his right to relief is based before a court of his own choice, if otherwise competent. It is true an application for an injunction was denied in that case because the plaintiff should in our opinion have taken the appeal allowed him by the law of Virginia while the rate of fare in litigation was still at the legislative stage, so as to make it absolutely certain that the officials of the State would try to establish and enforce an unconstitutional rule.

The case before us is not like that. It involves the constitutionality, with reference to the Federal Constitution, of two acts of the legislature of New York, and it is one over which the Circuit Court undoubtedly had jurisdiction under the act of Congress, and its action in taking and hearing the case cannot be the subject of proper criticism.

An examination of the record herein, with reference to the questions involved in the merits, shows that the act under which the Gas Commission was appointed was subsequently to the commencement and trial of this suit, declared, on grounds

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not here material, to be unconstitutional by the Court of Appeals of New York. 191 N. Y. 123, February 18, 1908. The order made by the commission must therefore be regarded as invalid. It is not important in this case, because the act of the legislature of 1906, makes the same provision as to the price of gas to consumers other than the city that the order does. We have as remaining to be considered the above-mentioned two acts of the legislature.

The question arising is as to the validity of the acts limiting the rates for gas to the prices therein stated. The rule by which to determine the question is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. *San Diego Land & Town Company* v. *National City*, 174 U. S. 739, 757; *Same* v. *Jasper*, 189 U. S. 439, 442.

Many of the cases are cited in *Knoxville* v. *Water Co.*, just decided, *ante*, p. 1. The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates. In this case the rates have not been enforced as yet, because the bill herein was filed and an injunction obtained restraining their enforcement before they came into actual operation.

In order to determine the rate of return upon the reasonable value of the property at the time it is being used for the public, it, of course, becomes necessary to ascertain what that value is. A very great amount of evidence was taken before the master upon that subject, which is included in five large volumes of the record. Valuations by expert witnesses were given as to the value of the real estate owned by the complainant, and as to the value of the mains, service pipes, plants, meters and miscellaneous personal property.

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The value of real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate when not based upon the actual cost of material and construction. Deterioration of the value of the plant, mains, and pipes is also to some extent based upon opinion. All these matters make questions of value somewhat uncertain; while added to this is an alleged prospective loss of income from a reduced rate, a matter also of much uncertainty, depending upon the extent of the reduction and the probable increased consumption, and we have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate. Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature, and in that event there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts.

A short history of the complainant, as to its incorporation and its capital, and the method by which the value of its franchises was arrived at, will render the further examination of the case more intelligible.

Prior to 1884 there were seven gaslight companies in New York City, each operated under separate charters, granted at different times between the years 1823 and 1865 or 1871. They

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each had the right to use the streets of certain portions of the city for the purpose of laying their mains and service pipes in order to furnish gas to the city and the citizens. Not one of the companies had ever been called upon to pay a penny for such right, but the grant to each was in that aspect a gratuity. It was not, at the time of granting franchises such as these, the custom to pay for them.

In 1884, by chapter 367 of the laws of that year, authority to consolidate manufacturing corporations was granted upon conditions mentioned in the act. The directors of the corporations proposing to consolidate were to make an agreement for consolidation, embracing, among other things, the amount of capital and the number of shares of stock into which it should be divided, the capital not to be in amount more "than the fair aggregate value of the property, franchises and rights of the several companies to be consolidated." The agreement was not to be valid until submitted to the stockholders of each of the companies and approved by two-thirds of each. The constituent companies, which were afterwards consolidated under their agreement, and pursuant to the act mentioned, were six in number, the seventh, the Mutual Company, withdrawing. The companies agreed upon the valuation of their property, which was to be paid for in the stock of the consolidated company, and the original stock held by the stockholders of each company was surrendered to the consolidated company. The value of the franchises of all the companies was set at the figure of $7,781,000. The court below said that the master reported there was little direct evidence before him as to the value of the franchises, to which the court added that if the master, by direct evidence, meant testimony of the same kind regarding their value as had been offered regarding every item of tangible property, there was none at all.

The court further stated "that it does not appear in the evidence how the valuation of the franchises was measured, or why the figures selected were chosen, but that it was true that when complainant was organized, in 1884, under the consolida-

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tion statute, which in terms permitted it to acquire the property and franchises of the other companies, it issued stock of the par value of $7,781,000, representing the franchises it then acquired and nothing else, and that the stock was held by purchasers, who, I am compelled to think, had a right to rely upon legal protection for legally issued stock." It is not, of course, contended there was special stock issued for this particular item, but it was included in the total sum for which the consolidated company issued its stock and upon its receipt the stockholders in the various companies surrendered their stock in those companies. The result was that the amount of the stock issued by the consolidated company was increased by $7,781,000, representing a value of franchises which was agreed upon by the stockholders in the companies, and which had never cost any of them a single penny.

It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation. *Monongahela Co.* v. *United States*, 148 U. S. 312; *People* v. *O'Brien*, 111 N. Y. 1, and cases cited. The important question is always one of value. Taking their value in this case as arrived at by agreement of their owners, at the time of the consolidation, that value has been increased by the finding of the court below to the sum of $12,000,000 at the time of the commencement of this suit. The trial court said: "If, however, complainant's franchises were worth $7,781,000 in 1884, and its tangible property, at the same time, was appraised (as appears in evidence), at $30,000,000 (in round figures), then since complainant's business (in sales volume) has, in twenty-three years, almost quadrupled, and its tangible assets grown to $47,000,000, it appears to me that a fair method of fixing value of the franchises in 1905 is to assume the same growth in value for the franchises as is demonstrated by the evidence in the case of tangible property. If, therefore, the franchise valuation of 1884 was proportioned to personalty and realty of $30,000,000, a franchise valuation proportioned to $47,000,000 in 1905 would be over $12,000,000. This, I think, a logical re-

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sult from the assumption I am compelled to start with, *i. e.*, that franchises have a separate and independent value. But there is, however, no method of valuing franchises, except by a consideration of earnings; earnings must be proportioned to assets; and both kinds of assets, tangible and intangible, must stand upon the same plane of valuation; having, therefore, a measure of growth of tangible assets from 1884 to 1905, the franchise assets must be assumed to have grown in the same proportion. I find that the value of complainant's franchises at the date of inquiry was not less than $12,000,000, making a total valuation of $59,000,000, upon which the probable return is $3,030,000, or very considerably less than 6 per cent." The judge stated his own views as opposed to including these franchises in the property upon the value of which a return is to be calculated in fixing the amount of rates, but held that he was bound by decided cases to hold against his personal views.

We are not prepared to hold with the court below as to the increased value which it attributes to the franchises. It is not only too much a matter of pure speculation, but we think it is also opposed to the principle upon which such valuation should be made. This corporation is one of that class which is subject to regulation by the legislature in the matter of rates, provided they are not made so low as to be confiscatory. The franchises granted the various companies and held by complainant consisted in the right to open the streets of the city and lay down mains and use them to supply gas, subject to the legislative right to so regulate the price for the gas as to permit not more than a fair return (regard being had to the risk of the business) upon the reasonable value of the property at the time it is being used for the public.

The evidence shows that from their creation, down to the consolidation in 1884, these companies had been free from legislative regulation upon the amount of the rates to be charged for gas. They had been most prosperous and had divided very large earnings in the shape of dividends to their stockholders, dividends which are characterized by the Senate committee,

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appointed in 1885 to investigate the facts surrounding the consolidation, as enormous. The report of that committee shows that several of the companies had averaged, from their creation, dividends over sixteen per cent, and the six companies in the year 1884 paid a dividend upon capital which had been increased by earnings, as in the case of the Manhattan and the New York, of eighteen per cent, and, had it been upon the money actually paid in, it would have been nearly twenty-five per cent.

The committee also said in the same report that these "franchises were in force November 10, 1884, the time of the consolidation, and the money invested in them was earning the same enormous dividends. So far as the evidence shows, there was nothing in the condition of affairs on the 10th of November to indicate that these franchises would not be as valuable for the next twenty years as they had been in the past. There were gas companies enough in the city with a capacity capable of supplying the demands for the next twenty years. A law was on our statute books that virtually prohibited the laying of any more gas pipes in the streets. The gas companies had an agreement among themselves, fixing the price of gas at a figure that paid these dividends. The people were paying this price, as they had in the past, without objection or protest. This price may have been too high, and the dividends were excessive, but they were not illegal, and the valuation of the franchises computed upon these dividends, and that state of facts cannot be called a violation of a law that expressly authorized it to be done, unless such valuation was too high."

The committee, upon these facts, were of opinion that the valuation of $7,781,000 for the franchises was not more than their fair aggregate value.

Assuming, as the committee did, that the company would be permitted to charge the same prices in the future which in the past had resulted in these "enormous" or "excessive" dividends, it need not be matter of surprise that a franchise by

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means of which such dividends had been possible was not regarded as overvalued at the sum stated in 1884.

We think that under the above facts the courts ought to accept the valuation of the franchises fixed and agreed upon under the act of 1884 as conclusive at that time. The valuation was provided for in the act, which was followed by the companies, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years past on the basis of the validity of the valuation and of the stock issued by the company.

But although the State ought, for these reasons, to be bound to recognize the value agreed upon in 1884 as part of the property upon which a reasonable return can be demanded, we do not think an increase in that valuation ought to be allowed upon the theory suggested by the court below. Because the amount of gas supplied has increased to the extent stated, and the other and tangible property of the corporations has increased so largely in value, is not, as it seems to us, any reason for attributing a like proportional increase in the value of the franchises. Real estate may have increased in value very largely, as also the personal property, without any necessary increase in the value of the franchises. Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference with the price for the supply of gas, but that immunity for the future was, of course, uncertain, and the moment it ceased and the legislature reduced the earnings to a reasonable sum the great value of the franchises would be at once and unfavorably affected, but how much so it is not possible for us now to see. The value would most certainly not increase. The question of the regulation of rates did from time to time thereafter arise in the legislature, and finally culminated in these acts which were in existence when the court below found this increased value of the franchises. We cannot, in any view of the case, concur in that finding.

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This increase in value did, however, form part of the sum upon which the court below held the complainant was entitled to a return. That court found the value of the tangible assets actually employed at the time of the commencement of this suit in the business of supplying gas by the complainant to be $47,831,435, to which it added the $12,000,000 as the value of the franchises as found by it, making the total of $59,831,435, upon which it held that the company was entitled to a return of 6 per cent, being $3,589,886.10. It also found its total net income for the year 1905 amounted to $5,881,192.45, almost 10 per cent upon the sum above named. Altering the finding of the court so far only as to place the value of the franchises at the time agreed upon in 1884, $7,781,000, the total value upon that basis of the property employed by the company would be $55,612,435, upon which 6 per cent would be $3,336,746.10, while the sum, estimated as the return on 80 cent gas would have been $3,024,592.14, which is nearly 5½ per cent on the above total of $55,612,435.

What has been said herein regarding the value of the franchises in this case has been necessarily founded upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us. We simply accept the sum named as the value under the circumstances stated.

There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which an investor might properly expect

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or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference, than can be obtained from an investment in Government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain, if possible, a much greater rate upon his investment than he who invested in such property in the city of New York years after the risk and danger involved had been almost entirely eliminated.

In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation, which in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of six per cent would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily

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sought and obtained on investments of that degree of safety in the city of New York.

Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use. But assuming that the company is entitled to six per cent upon the value of its property actually used for the public, the total value fixed by the court below is, as we have seen, much too large. We must first strike out the increased value of the franchises asserted by the court over the amount agreed upon in 1884, when the companies were consolidated. We also find that the total value of the tangible property is made up of several items, two of which are—

Real estate	$11,985,435
Plants	15,000,000

Both depend largely upon the opinions of expert witnesses as to the value of that kind of property. Where a large amount of the total value of a mass of different properties consists in the value of real estate, which is only ascertained by the varying opinions of expert witnesses, and where the opinions of the plaintiffs' witnesses differ quite radically from those of the defendants', it is apparent that the total value must necessarily be more or less in doubt. It, in other words, becomes matter of speculation or conjecture to a great extent. It may be, as already suggested, that in many cases the rates objected to might be so low that there could be no reasonable doubt of their inadequacy upon any fair estimate of the value of the property. In such event the enforcement of the rates should be enjoined even in a case where the value of the property depends upon the value to be assigned to real estate by the evidence of experts. But there may be other cases where the evidence as to the probable result of the rates in controversy would show they were so nearly adequate that nothing but a practical test could satisfy the doubt as to their sufficiency.

In this case a slight reduction in the estimated value of the real estate, plants and mains, as given by the witnesses for

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complainant, would give a six per cent return upon the total value of the property as above stated. And again, increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished.

The elevated railroads in New York when first built charged ten cents for each passenger, but when the rate was reduced to five cents it is common knowledge that their receipts were not cut in two, but that from increased patronage the earnings increased from year to year, and soon surpassed the highest sum ever received upon the ten cent rate.

Of course, there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property, but it is equally true that a reduction in rates will not always reduce the net earnings, but on the contrary may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are from the evidence so uncertain, and where the margin between possible confiscation and valid regulation is so narrow we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient.

The complainant also contends that the State having taxed it upon its franchises cannot be heard to deny their existence or their value as taxed.

The fact that the State has taxed the company upon its franchises at a greater value than is awarded them here, is not material. Those taxes, even if founded upon an erroneous valuation, were properly treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount could be arrived at applicable to dividends, and if such latter sums were not sufficient to permit the proper return on the property used by the company for the public,

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then the rate would be inadequate. The future assessment of the value of the franchises, it is presumed, will be much lessened if it is seen that the great profits upon which that value was based are largely reduced by legislative action. In that way the consumer will be benefited by paying a reduced sum (although indirectly) for taxes.

We are also of opinion that it is not a case for a valuation of "good will." The master combined the franchise value with that of good will, and estimated the total value at $20,000,000.

The complainant has a monoply in fact, and a consumer must take gas from it or go without. He will resort to the "old stand," because he cannot get gas anywhere else. The court below excluded that item, and we concur in that action.

And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented.

The matter of the increased cost of the gas, resulting from the provisions of the acts, as to making the gas equal to 22 candle-power, is also alleged as a reason for inadequacy of rate.

It appears that the average candle-power actually produced in the first six months of the year 1905 was 22, while but 20 candle-power was exacted by law, and for the last six months of that year, while 22 candle-power was exacted, the average

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amount was 24.19. This expense was included in the operating expense of that year, which resulted in the net earnings above mentioned, while the company was complying with the requirements of the act in this particular.

It is unnecessary, therefore, to further inquire as to the additional expense caused by this requirement.

Again, it has been asserted that the laws are unconstitutional, because of the provision as to pressure, and also by reason of the penalties which a violation of the acts may render a corporation liable to.

The acts provide that the pressure of the gas in the service mains at any distance from the place of manufacture shall not be less than one inch nor more than two and a half inches.

The evidence shows that to put a pressure such as is demanded by the acts upon the mains and other service pipes in their present condition would be to run a great risk of explosion, and consequent disaster. Before compliance with this provision would be safe the mains and other pipes would have to be strengthened throughout their whole extent, and at an expenditure of many millions of dollars, from which no return could be obtained at the rates provided in the acts. This would take from the complainant the ability to secure the return to which it is entitled upon its property, used for supplying gas, and the provision as to the amount of pressure is therefore void. This particular duty imposed by the acts is, however, clearly separable from the enactments as to rates, and we have no doubt that the remainder of the statute would have been enacted, even with that provision omitted.

The obligation would remain upon the company to have a pressure sufficient to insure a light of 22 candle-power, as provided in the acts.

We are of the same opinion as to the penalties provided for a violation of the acts. They are not a necessary or inseparable part of the acts, without which they would not have been passed. If these provisions as to penalties have been properly construed by the court below, they are undoubtedly void,

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within the principle decided in *Ex parte Young*, 209 U. S. 123, and the cases there cited, because so enormous and overwhelming in their amount.

When the objectionable part of a statute is eliminated, if the balance is valid and capable of being carried out, and if the court can conclude it would have been enacted if that portion which is illegal had been omitted, the remainder of the statute thus treated is good. *Reagan* v. *Trust Co.*, 154 U. S. 362, 395; *Berea College* v. *Commonwealth of Kentucky*, 211 U. S. 45, 54. This is a familiar principle.

Lastly, it is objected that there is an illegal discrimination as between the city and the consumers individually. We see no discrimination which is illegal or for which good reasons could not be given. But neither the city nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether, by the reduced price to the city, the complainant is upon the whole unable to realize a return sufficient to comply with what it has the right to demand. What we have already said applies to the facts now in question.

We cannot see from the whole evidence that the price fixed for gas supplied to the city by the wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return it is not important that with relation to some customers the price is not enough. *Minneapolis &c.* v. *Minnesota*, 186 U. S. 257; *Atlantic Coast Line* v. *North Carolina Commission*, 206 U. S. 1.

Upon a careful consideration of the case before us we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the State of New York are in fact confiscatory.

It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might

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prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice, and

It is so ordered.

RAKES v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 257. Argued January 4, 1909.—Decided January 18, 1909.

Jurisdiction of this court to review judgments of conviction in criminal cases under clause 3 of § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827, as amended by the act of July 20, 1897, c. 68, 29 Stat. 492, depends on the sentence which can be imposed, and not on the crime charged in the indictment; and where the Federal statute prescribes that the punishment shall be the same as that prescribed by the state law and under the state law the punishment is less than capital a writ of error will not lie.

The suggestion in the brief of counsel of the unconstitutionality of the statute under which plaintiff in error was convicted, does not raise an issue involving the construction or application of the Constitution giving this court jurisdiction to review under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827, when the contention presented has been heretofore adversely disposed of; nor does the assertion of errors of construction furnish a basis for jurisdiction under that statute.

THE facts are stated in the opinion.

Mr. Waller R. Staples for plaintiff in error.

Mr. Assistant Attorney General Fowler for defendant in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This is a writ of error issued directly from this court to the

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District Court of the United States for the Western District of Virginia under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827, as amended by the act of July 20, 1897, c. 68, 29 Stat. 492, and cannot be maintained unless this was a case of "conviction of a capital crime," or a case involving "the construction or application of the Constitution of the United States," or a case in which "the constitutionality of any law of the United States is drawn in question."

Plaintiff in error was indicted under §§ 5508 and 5509 of the Revised Statutes for conspiracy, and for killing one Ann Hall in carrying out said conspiracy, and was found guilty of the conspiracy and of murder in the second degree, the jury fixing the punishment "for said last mentioned offense at imprisonment in the penitentiary for fifteen (15) years." Judgment was rendered against him of imprisonment in the United States Penitentiary at Atlanta, Georgia, for a period of fifteen years and one day, commencing on the day of his committal to the penitentiary, and he was fined $100.

By § 5508 of the Revised Statutes it is made an offense against the United States for two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, the punishment prescribed being a fine of not more than $5,000, imprisonment not more than ten years and ineligibility to any office or place of honor, profit or trust created by the Constitution or laws of the United States. And by § 5509 it is provided that if in committing the above offense any other felony or misdemeanor be committed, the offender shall suffer such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed.

Section 3664 of the Code of Virginia enacts that "murder of the second degree, shall be punished by confinement in the penitentiary not less than five nor more than eighteen years."

Class 3 of § 5 gives the writ directly in "cases of conviction of a capital crime," and this case does not fall within it, because

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under the verdict capital punishment could not be inflicted. The jurisdiction of this court, in this regard, does not depend upon the crime charged in the indictment, and it is clear that as the accused was found guilty of murder in the second degree, for which the sentence of death could not be imposed, he was not convicted of a capital offense.

In *Fitzpatrick* v. *United States*, 178 U. S. 304, Fitzpatrick was indicted for murder in the first degree, and the jury returned a verdict of guilty "without capital punishment," as permitted by the statute. The United States insisted that this was not "conviction of a capital crime," but Mr. Justice Brown, speaking for the court, said that the qualification "does not make the crime of murder anything less than a capital offense or a conviction for murder anything less than a conviction for a capital crime, by reason of the fact that the punishment actually imposed is imprisonment for life. The test is not the punishment which is imposed, but that which may be imposed under the statute." And see *Good Shot* v. *United States*, 179 U. S. 87. But in the present case the accused was found guilty of murder in the second degree, for which the sentence of death could not be imposed, and it was not a case where the penalty of death was escaped by qualification of the verdict.

In *Davis* v. *United States*, 107 Fed. Rep. 753, the defendant could have been convicted under the indictment for a capital offense, but was in fact found guilty only of a conspiracy, and the Circuit Court of Appeals for the Sixth Circuit correctly held that that court had jurisdiction. And, speaking through Severens, J., said: "Only the conspiracy is of Federal cognizance, and it is that offense which is made punishable. If, in the prosecution of it, a thing is done which is a crime by the laws of the State the conspiracy is punishable by a measure of punishment equal to that prescribed by the law of the State for such other crime. But it is an aggravation merely of the substantive offense of conspiracy. If the latter is not proven there can be no conviction for the offense which constitutes the aggravating circumstance, and the proceeding falls to the ground. It is

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plainly indicated in *Motes* v. *United States*, 178 U. S. 458, that this is the view taken of these sections by the Supreme Court. It cannot be doubted that it was within the power of Congress to deal with such a conspiracy and impose such punishment therefor as it should deem proper; and, having such authority, it was competent to take notice of such incidents of violence and wrong as were likely to happen in the prosecution of such combinations, and to measure the punishment by that which is prescribed by the local law for such acts when made, of themselves, the subject of punishment. Though measured by those laws, the penalty is imposed by the law of the United States."

Nor can we see that the case involved the construction or application of the Constitution of the United States, or drew in question the constitutionality of a law of the United States, because no definite issue was raised in regard thereto, and, while in the brief of counsel for plaintiff in error it was suggested that § 5509 was unconstitutional, that contention, however presented, was long since put at rest. *Motes* v. *United States*, 178 U. S. 458; *Logan* v. *United States*, 144 U. S. 263; *In re Quarles*, 158 U. S. 532. And assertion of errors of construction furnishes no basis for jurisdiction on constitutional grounds under § 5 of the act of March 3, 1891.

Writ of error dismissed.

PRESIDIO COUNTY, TEXAS, *v.* THE NOEL-YOUNG BOND & STOCK COMPANY.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 41. Argued December 4, 1908.—Decided January 18, 1909.

Where the officers having statutory authority to issue bonds have also the statutory authority to determine whether conditions precedent have been performed, certify by recitals therein that the bonds are issued in virtue of the statute, such recitals import compliance with

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the statute upon which a *bona fide* purchaser can rely, and the obligor cannot against such a purchaser assert the contrary. *Evansville* v. *Dennett*, 161 U. S. 434.

In the absence of evidence to the contrary the presumption is that a third party producing a genuine negotiable instrument is a *bona fide* purchaser for value.

The doctrine of *lis pendens* has no application to commercial securities. *Orleans* v. *Platt*, 99 U. S. 676, 682.

In respect to the doctrines of commercial law and general jurisprudence, while courts of the United States, in questions balanced with doubt, will, for the sake of harmony, lean towards an agreement with the state courts, as a general rule they will exercise their independent judgment uncontrolled by decisions based on local statutes and usage; and so in this instance as the state court proceeded in part on grounds inconsistent with the decisions of this court in such cases, its decision should not be followed. *Ball, Hutchings & Co.* v. *Presidio County*, 88 Texas, 60, not followed.

Although a coupon is for interest to become due on the bond the promises to pay are as distinct as though expressed in different instruments, and, as the bond and the coupons are capable of separate ownership, a suit on the bonds and a suit on the coupons are based on different causes of action.

A *bona fide* purchaser for value before maturity of bonds is not precluded or affected by an adverse judgment in a suit on the coupons of those bonds to which suit he is not a party and of which he had no notice.

000 Fed. Rep. 000, affirmed.

THE facts, which involve the validity of bonds issued by the petitioner, are stated in the opinion.

Mr. T. J. Beall for petitioner:

The judgment of the District Court of Presidio County, rendered in March, 1893, and affirmed by the Supreme Court of Texas, in which the bonds in this case were held void, was a bar to plaintiff's action, and the court should have so instructed the jury. *Lewis* v. *Brown Township*, 109 U. S. 162, 168; *Ball, Hutchings & Co.* v. *Presidio County*, 88 Texas, 60.

A judgment is conclusive, not only upon those who are actual parties to the litigation, but also upon all persons who are in

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privity with them, in law or estate, and a person is bound by a judgment as a privy to one of the parties, when he has succeeded to some right, title or interest of that party in the subject-matter of the litigation. 2 Black on Judgments, § 549; *Calderwood* v. *Brooks*, 28 California, 151; *Thompson* v. *Clarke*, 4 Hun, 164.

The bonds sued on were issued without lawful authority, not being supported or authorized by any order of the Commissioners' Court of Presidio County, Texas. 88 Tex. Rep. 60; *Caruthers* v. *The State*, 67 Texas, 182; *Francis* v. *Howard County*, 50 Fed. Rep. 62.

The bonds were issued and delivered for the illegal purpose of furnishing a courthouse already constructed. They were issued without any lawful authority, the power of the county to issue bonds to erect a courthouse and jail having been exhausted, as appears from the order of the Commissioners' Court recited on the face of the bonds, and the contracts mentioned in said order of the court and the registry of said bonds affected with notice the purchasers of the bonds in this suit, that said bonds were issued without authority of law. *Caruthers* v. *The State*, 67 Texas, 132; *Nolan County* v. *The State*, 83 Texas, 183; *Francis* v. *Howard County*, 50 Fed. Rep. 62; *Francis* v. *Howard County*, 54 Fed. Rep. 487; *Davies County* v. *Dickinson*, 117 U. S. 657; *City of Brenham* v. *Bank*, 144 U. S. 173; *Nesbitt* v. *Independent District*, 144 U. S. 610; *Dickson County* v. *Field*, 111 U. S. 83; *Knox County* v. *Aspinwall*, 21 How. 539; *Ogden* v. *Davis County*, 102 U. S. 634; *Sutliff* v. *Board*, 147 U. S. 230; *Lake County* v. *Graham*, 130 U. S. 675; *Buchanan* v. *City of Litchfield*, 102 U. S. 278; *Clabourne County* v. *Brooks*, 111 U. S. 400; *Lewis* v. *City of Shreveport*, 180 U. S. 283; Dill. Mun. Corp., § 546.

The order of December 4, 1886, did not authorize the issuing of the bonds, and the undisputed evidence shows that blank lithographic courthouse and jail bonds were filled out and delivered to the contractor, for the unlawful purpose of furnishing the courthouse, for which purpose there is no authority of

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law, under the constitution and laws of Texas, to issue bonds. Revised Statutes, Texas, art. 1527; *Holly* v. *Hopkins*, 74 Texas, 147; *Brown* v. *Rease*, 57 Texas, 318; *Barnett* v. *City of Dennison*, 145 U. S. 141; *Anthony* v. *Jasper County*, 101 U. S. 693; *School District* v. *Stone*, 106 U. S. 183; *Harchman* v. *Bates County*, 92 U. S. 169; *Bates County* v. *Winters*, 97 U. S. 85; *Colar* v. *City of Cleburne*, 131 U. S. 162; *Township of Oakland* v. *Skinner*, 94 U. S. 248; *Martin* v. *Nesbitt*, 86 Tennessee, 383; *Lewis* v. *Barber County*, 12 Kansas, 186; *Well* v. *Supervisors*, 102 U. S. 625.

The recitals of the laws, under which the bonds purport to be issued, are not the recital of any facts, but only conclusions of law. *Davis County* v. *Dickens*, 117 U. S. 657; *Francis* v. *Howard County*, 54 Fed. Rep. 487.

Mr. Millard Patterson, for respondent, submitted:

The plea of former judgment relied upon by plaintiff in error being simply as to the alleged fact that interest coupons had been held void upon the ground that the coupons (and bonds) had been issued for an unlawful purpose, to wit: to buy furniture, this plea as to this collateral fact was not established by the judgment of the Supreme Court of Texas, which did not decide that point, but simply decided that the interest coupons were void because they had no order of the Commissioners' Court to support them. *City of Aurora* v. *West*, 7 Wall. 82-107; *Russell* v. *Place*, 94 U. S. 606; *Lyon* v. *P. & G. Mfg. Co.*, 125 U. S. 698, 702; Stephens on Pleading, § 353; *Field's Estate*, 2 Rawle (Pa.), 357; *Greeley* v. *Smith*, Fed. Cas. 5,749; *Godard* v. *Benson*, 15 Abbotts' Practice, 191; *Sims* v. *Frankfort*, 79 Indiana, 446; *Crandell* v. *Gallup*, 12 Connecticut, 373; *Texas Banking Co.* v. *Hutchins*, 53 Texas, 61.

The judgment of the Supreme Court of Texas on certain interest coupons maturing prior to 1893 could under any circumstances only be a bar in this action on the bonds maturing in 1901 as to the point actually litigated and determined.

The cause of action in the suit of Ball, Hutchings & Co. being certain coupons which matured prior to 1893, and this suit

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being upon the bonds which matured in 1901, the causes of action are different.

The judgment of the Supreme Court of Texas being simply upon certain coupons which had then matured cannot be binding on defendant in error, as this suit was brought, not upon any of those coupons, but upon the six bonds themselves more than ten years afterward, and defendant in error was not a party to that case, and the subject-matter of this suit was different from the subject-matter in the former case. *Nesbitt* v. *Ind. District of Riverside*, 144 U. S. 610, 621; *Cromwell* v. *Sac County*, 94 U. S. 351, 371; *Wilmington & W. Ry. Co.* v. *Alsbrook*, 146 U. S. 279, 302; *Keokuk & W. R. R. Co.* v. *Scotland Co.*, 152 U. S. 314, 315; *Ball, Hutchings & Co.* v. *Presidio Co.*, 88 Texas, 65.

The Commissioners' Court of Presidio County having power to issue the bonds; and it being shown that they were issued under an order of that court, and recited upon their face that they had been issued for the lawful purpose of building a courthouse, and full value having been paid for them by the original purchasers without any notice to the contrary, the only issue raised by the pleadings was whether or not they were void because in fact issued for the unlawful purpose of furnishing the courthouse; and the trial court, and the United States Circuit Court of Appeals, did not err in determining that the purchaser of the bonds had a right to rely upon the truth of the recitals.

Even if the recital in the bonds as to the date of the order under which they were issued was false, whether intentional or inadvertent, would not bind or affect a purchaser with notice of the fact that the bonds were issued for an unlawful purpose. *Pickens Township* v. *Post*, 99 Fed. Rep. 650, and cases there cited; *Chaffee County Coms.* v. *Potter*, 142 U. S. 355, 366; *Nolan County* v. *The State*, 83 Texas, 182–201; *Waite* v. *Santa Cruz*, 184 U. S. 302, 329; *Evansville* v. *Dennett*, 161 U. S. 434, 446; *Stanley County Commissioners* v. *W. N. Coler & Co.*, 190 U. S. 442, 444; *Venice* v. *Murdock*, 92 U. S. 494, 502; *Pine Grove Township* v. *Talcott*, 19 Wall. 666, 679; *Marshall County* v.

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Schenck, 5 Wall. 772, 785; *Scotland Co.* v. *Hill*, 132 U. S. 107, 117; *Orleans* v. *Platt*, 99 U. S. 676; *Board of Commissioners* v. *National Life Ins. Co.*, 90 Fed. Rep. 231; *Village of Kent* v. *Dana*, 100 Fed. Rep. 60.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an act of the legislature of Texas approved February 11th, 1881, the County Commissioners' Court of every county that had no courthouse was authorized and empowered to issue county bonds, with interest coupons attached, in such amount *as might be necessary* to erect a suitable building for a *courthouse* —such bonds to run not exceeding fifteen years, redeemable at the pleasure of the county, and bearing interest at a rate not exceeding eight per cent per annum. The act provided that the bonds should be signed by the County Judge, countersigned by the County Clerk and registered by the County Treasurer before being delivered. It also provided that the county should not issue a larger number of bonds than a tax of one-fourth of one per cent annually would liquidate in ten years, and that the bonds should be sold only at par value. General Laws, Texas, 1881, p. 5.

This act was amended in 1884, at a called session of the eighteenth legislature of Texas, so as to authorize the Commissioners' Court to issue county bonds (running not exceeding fifteen years) with interest coupons attached in such amount *as might be necessary* to erect a suitable *courthouse* building or *jail*, or *both*. General Laws, Texas, 1884, p. 28.

By another act passed March 27th, 1885, the power given by the act of 1884 to issue bonds for courthouse and jail purposes, or both in such amount as might be necessary, was recognized, and in addition county bonds theretofore issued for jail purposes under the act of 1881, as amended by the act of 1884, were validated. General Laws, Texas, 1885, p. 56.

The present action was brought July 26th, 1904, by the Noel-Young Bond & Stock Company, a Missouri corporation, a-

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holder, owner and bearer, to recover the amount of certain bonds—numbered 90, 91, 92, 94, 95 and 96, respectively—with interest coupons attached.

Each of the bonds sued on is in the name of the county, is for $1,000 and payable to bearer fifteen years after date, at 8 per cent per annum interest, on the tenth of April, at the State Treasury. It recites that it was "issued by virtue of an act of the Legislature of the State of Texas, entitled 'An act to authorize the County Commissioners' Court of the several counties of the State to issue bonds for the erection of a courthouse and to levy a tax to pay for the same,' approved February 11, 1881, and by virtue of the provisions of chapter 17, laws of called session of the Eighteenth Legislature, which said chapter has since been validated by the act of March 27, 1885, authorizing the County Commissioners' Court of the several counties of the State to issue bonds for the erection of a county jail, and by order of the County Commissioners' Court of said County of Presidio, on the 9th day of February, 1886, and is redeemable before maturity at the pleasure of the county."

To each bond was affixed the seal of the County Commissioners' Court and was signed by the County Judge, countersigned by the Clerk of the County Court and by the County Treasurer, the latter certifying that it had been registered.

At the trial the court instructed the jury that the suit on the coupons was barred by the Texas statute of limitations, but it directed a verdict for the amount of the bonds with interest from December 6, 1900. That judgment was affirmed in the Circuit Court of Appeals, but without any opinion.

The county insists that although the bonds purport to have been issued by order of the County Commissioners' Court in virtue of certain legislative enactments referred to on the face of the bonds, and which authorizes that court to issue bonds for the erection of a courthouse or jail, or both, and although each bond is attested by the seal of the Commissioners' Court and the signatures of the officers who alone could attest and sign bonds issued for courthouse and jail purposes, the court

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exceeded its powers in issuing the present bonds in that by its order of February 9th, 1886 bonds to the extent of only $86,000 were authorized—$60,000 for a courthouse and $26,000 for a jail; whereas, that amount of bonds for such purposes had in fact been issued before the bonds in suit. This contention means that the bonds in suit are to be deemed void if they were in fact in excess of the amount authorized by the order of February 9th, 1886. But that view cannot be maintained consistently with a long line of decisions.

Whether the Commissioners' Court, which had statutory authority to issue such bonds as were necessary for courthouse and jail purposes, had previously made the requisite order therefor was a matter peculiarly within the knowledge of its officers. They knew whether they had or had not directed bonds to be issued for such purposes. They knew, or ought to have known, whether the bonds, ordered to be issued, were in excess of the amount authorized by the legislature. They had authority to determine whether the precedent conditions had been fully performed. When, therefore, the county, acting by the Commissioners' Court, did issue bonds, attested by the seal of the court and the signatures of its officers, and reciting that they were issued under the order of the court, *in virtue* of the statute named, and were registered—such recitals fairly importing a compliance, in all substantial respects, with the statute giving authority to issue bonds—a *bona fide* purchaser was entitled to accept the recitals as stating the truth, and the county cannot, as against such purchaser, allege the contrary. It will not be heard to say that the bonds were in excess of the amount authorized, or that they were not issued for the purposes contemplated by the statutes referred to. These principles have become firmly established, as will be seen by an examination of the adjudged cases, some of which are cited in the margin.[1]

[1] *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Buchanan* v. *Litchfield*, 102 U. S. 278; *School District* v. *Stone*, 106 U. S. 183; *Commissioners* v. *Bolles*, 94 U. S. 104; *Anderson County Commissioners* v. *Beal*, 113 U. S.

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The county, however, insists that an examination of the order of the Commissioners' Court of February 9th, 1886, referred to in the bonds, would have informed any purchaser (1) that that court on that day ordered only $86,000 in bonds to be issued—$60,000 for a courthouse and $26,000 for a jail; (2) that the particular bonds now in suit, dated December 6th, 1886, and numbered 91 to 96 inclusive, were not covered by that order and therefore were in excess of the amount so ordered for courthouse and jail buildings. Assuming for the moment, but only for the moment, that the purchaser was bound to ascertain what the order of February 9th, 1886 contained, we observe that the statutes recited in the bonds did not name a specific amount beyond which the Commissioners' Court could not go in issuing bonds for courthouse and jail purposes. They were authorized to issue for those purposes such an amount in bonds as was necessary up to the point that no more be issued than could be liquidated in ten years by a tax of one-fourth of one per cent for any one year. It was for the Commissioners' Court in the first instance to determine what amount of bonds on that basis was required. We observe, also, as did the Civil Court of Appeals of Texas in a case to be presently referred to (27 S. W. Rep. 702, 720), that the order of February 9th, 1886 did not require that the bonds issued for courthouse and jail purposes should be numbered consecutively from 1 to 86; that the bonds in suit bore numbers above 86 was immaterial in face of the recital in them that they were issued by order of the Commissioners' Court and in virtue of the statutes conferring the power to issue bonds for courthouse and jail purposes; and that that order gave no information that the bonds

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227, 238-239; *Chaffee County* v. *Potter*, 142 U. S. 355, 364; *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, 270; *Mercer County* v. *Hacket*, 1 Wall. 83; *Cairo* v. *Zane*, 149 U. S. 122; *Town of Venice* v. *Murdock*, 92 U. S. 494; *Marcy* v. *Town of Oswego*, 92 U. S. 637; *Wilson* v. *Salamanca*, 99 U. S. 499; *Sherman County* v. *Simons*, 109 U. S. 735, 737; *Hackett* v. *Ottawa*, 99 U. S. 86, 95; *Ottawa* v. *National Bank*, 105 U. S. 342, and authorities cited in each of the above cases.

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here in suit were in excess of the $86,000 in bonds directed by that order to be issued.

Apart from this view, it is pertinent to inquire whether the purchaser was bound to examine the order of February 9th, 1886, and, at his peril, to know what that order contained? Was he not entitled without special or further inquiry to accept as true what the recitals in the bonds plainly imported, namely, that the bonds were issued for courthouse or jail purposes by order of the County Commissioners' Court, in conformity with specified acts of the legislature? Was he not entitled to act on the belief that the bonds issued under date of December 6th, 1886, were within the limit authorized by the legislature?

These questions find an answer in *Evansville* v. *Dennett*, 161 U. S. 434, 441, 445, 446. That was an action involving the validity of two series of bonds, issued by the city of Evansville, Indiana, for subscription to certain railroads. Each bond of the two series contained recitals to the effect that the bonds were issued in pursuance of certain legislative enactments, and by virtue of certain resolutions and ordinances passed by the city council. What was the effect of these recitals? This court said: "It is true that the city charter provided that 'no stock shall be subscribed or taken by the common council in such company, unless it be on the petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed.' But these were only conditions which the statute required to be performed or met before the power given was exercised. That there was legislative authority to subscribe to the stock of these companies cannot be questioned, although the statute declared that the power should not be exercised except under the circumstances stated in the statute. Was a *bona fide* purchaser of bonds issued in payment of a subscription of stock—the power to subscribe being clearly given—bound to know that the conditions precedent to the exercise of the power were

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not performed? If the bonds had not contained any recitals importing a performance of such conditions before the power to subscribe was exercised, then it would have been open to the city to show, even as against a *bona fide* purchaser, that the bonds were issued in disregard of the statute, and, therefore, did not impose any legal obligation upon it. *Buchanan* v. *Litchfield*, 102 U. S. 278; *School District* v. *Stone*, 106 U. S. 183, 187. But the bonds issued on account of subscription to the stock of the Evansville, Henderson and Nashville Railroad Company recite that the subscription was 'made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof.' This imports not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute. It is as if the city had declared, in terms, that all had been done that was required to be done in order that the power given might be exercised. . . . As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature. . . . The city having authority, under some circumstances, to put these bonds upon the market, and having issued them under the corporate seal of the city, and under the attestation of its highest officer, certifying that they were issued in payment of a subscription of stock made in pursuance of the city's charter, the principles of justice demand that the bonds, in the hands of *bona fide* holders for value, should be met according to their terms, unless some clear, well-settled rule of law stands in the way. No such obstacle exists."

In the same case the court expressed its approval of the de-

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cision in *Van Hostrup* v. *Madison City*, 1 Wall. 291, 296—a suit on municipal bonds—in which Mr. Justice Nelson, speaking for the court said: "Another objection taken is, that the proviso requiring a petition of two-thirds of the citizens, who were freeholders of the city, was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the common council of the city, passed September 2, 1852. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds, as has been repeatedly held by this court."

In *Waite* v. *Santa Cruz*, 184 U. S. 302, 320, which was also a suit on municipal bonds and involved the effect of recitals importing compliance with law, the court referred to and followed *Evansville* v. *Dennett*. It said: "The city of Santa Cruz had power, under the constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the constitution of the State. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary,

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purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds."

In the more recent case of *Stanly County* v. *Coler*, 190 U. S. 437, the court reviewed many of the adjudged cases and in support of the conclusion there reached cited, among other cases, that of *Evansville* v. *Dennett*. See also the recent case of *Quinlan* v. *Green County*, 205 U. S. 410.

Our conclusion on this branch of the case is that the county of Presidio is estopped by the recitals in its bonds to deny, as against a legal holder of the bonds, that they were issued conformably, in all respects, with the acts of legislation referred to.

It is, however, contended that this principle only affords protection to *bona fide* purchasers for value. But clearly the plaintiff is to be taken, upon the present record, as belonging to that class; for, there was no evidence that it had knowledge or notice of any facts impeaching the validity of the bonds, or that were inconsistent with their recitals, nor was there any evidence showing that the plaintiff was not a *bona fide* purchaser for value of these bonds. In the absence of such proof the presumption was that the plaintiff obtained the bonds underdue, or before maturity, in good faith, for a valuable consideration, without notice of any circumstances impeaching their validity. The production of a negotiable instrument sued on, with proof of its genuineness, if its genuineness be not denied, makes a *prima facie* case for the holder. In other words, the possession of the bonds in this case, their genuineness not being disputed, made a *prima facie* case for the plaintiff. These views are in accordance with accepted doctrines of the law relating to negotiable securities. *Swift* v. *Tyson*, 16 Pet. 1, 16; *Murray* v. *Lardner*, 2 Wall. 110, 121; *Chambers County* v. *Clews*, 21 Wall. 317, 323; *San Antonio* v. *Mehaffy*, 96 U. S. 312, 314; *Montclair* v. *Ramsdell*, 107 U. S. 147, 158; 2 Parsons' Bills and Notes, 9; *Pinkerton* v. *Bailey*, 8 Wend. 600; Story on Promissory Notes, § 196; 1 Daniel on Negotiable Instruments, 5th ed., § 812, and the authorities there cited; Chitty on Bills, 11th

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Amer. ed. 69; *Arbouin* v. *Anderson*, 1 Adolph. & Ellis, New R. 498, 504.

But there is another defense by the county which must be noticed. It is, that the validity of these bonds has been adjudicated by the courts of Texas, and that that adjudication concludes the plaintiff in the present action. The facts upon which that defense is based are these: On the twenty-eighth of March, 1893, Ball, Hutchings & Co. sued Presidio County on certain *coupons* of bonds, numbered from 90 to 96, inclusive, and dated December 6th, 1886—the same bonds here sued on, except bond numbered 93, which is not involved in this suit. The county, among other defenses, alleged that the bonds were issued and delivered to contractors for the purpose of obtaining *furniture* for the courthouse; that the contractors therefore had notice of the purpose for which the bonds were issued; that their issue for the purpose of supplying the courthouse with furniture was illegal, fraudulent and void; and, therefore, no judgment could be rendered for the amount of the coupons sued on. The state court rendered a judgment for the county. From that judgment an appeal was prosecuted to the Civil Court of Appeals of Texas, which reversed the judgment and ordered one against the county. 27 S. W. Rep. 702, 707. That court, among other things, held that there was nothing in the order of February 9th, 1886 indicating that the bonds numbered 90 to 96 were not of the bonds therein ordered to be issued for courthouse and jail purposes; that no question was made that the amount of all the bonds issued for building a courthouse and jail and for furniture and waterworks was not within the county's statutory limit for the issuing of bonds for the building of a courthouse and jail; and that it was not inconsistent with their being part of the bonds ordered for courthouse and jail purposes that they were numbered from 90 to 96. That court further said: "These bonds purport on their face to have been issued by virtue of the acts authorizing bonds for the erection of a courthouse and jail, and, by virtue of a certain order of the proper court, which was, upon its face, authority

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for the issuance of a bonded debt for said purpose, in the sum of $86,000; and there is nothing in the order to indicate to the mind that there had been an overissue, or that these particular bonds were not a part of the $86,000. . . . In fact, these bonds would seem to have been prepared and issued in a manner that concealed their true character, and to mislead investors in that class of securities; and we are of opinion, on the whole case, that the county is estopped to deny its liability to the purchasers."

This last observation of the Texas Civil Court of Appeals had, no doubt, reference to the fact (which evidence in this suit tended to establish), that although the particular bonds in suit were issued pursuant to an order of the Commissioners' Court made December 4th, 1886 to pay for courthouse *furniture* they contained recitals fairly implying that they were issued under the order of February 9th, 1886 and the statutes for the purpose of building a courthouse and jail.

That case was taken to the Supreme Court of Texas, which reversed the judgment of the Civil Court of Appeals and affirmed the judgment of the court of original jurisdiction. *Ball, Hutchings & Co.* v. *Presidio County*, 88 Texas, 60–66. The Supreme Court of Texas assumed, for the purposes of its opinion, that the County Commissioners' Court had the power under the acts of the legislature to issue bonds of the county for courthouse and jail purposes to the full amount of $96,000. Yet, it said, the order of February 9th, 1886, referred to in the bonds, showed that only $86,000 of bonds were authorized by that order to be issued for such purposes, and, therefore, that the bonds in suit were issued without any order to support them; that "the law requires" a dealer in county bonds to know the provisions of the act of the legislature and *the order of the County Commissioners' Court*, under and by virtue of which such bonds were issued, whether referred to on the face of the bonds or not; that the facts made known by the order of February 9th, 1886 were sufficient to put a purchaser on inquiry as to whether the coupons of the bonds now in suit were in

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excess of the amount authorized by that order; that the burden of proof being upon Ball, Hutchings & Co. to show that they were *bona fide* holders, it was incumbent on them, as plaintiffs, to prove that proper diligence had been used to ascertain the facts; and that having made no such proof, they were not entitled to judgment.

It is apparent that the Supreme Court of Texas proceeded in part upon grounds inconsistent with the decisions of this court in cases involving the rights of the holders of commercial paper. We allude here particularly to that part of its opinion holding that whatever the import of the recitals in the bonds a purchaser was bound to ascertain what were the provisions of the order of February 9th, 1886, under and by virtue of which the bonds purport to have been issued. In that view we do not concur, as what has been said in this opinion sufficiently indicates. Since the decision in *Swift* v. *Tyson*, 16 Pet. 1, 19, it has been the accepted doctrine of this court that, in respect of the doctrines of commercial law and general jurisprudence the courts of the United States will exercise their own independent judgment, and in respect to such doctrines will not be controlled by decisions based upon local statutes or local usage, although, if the question is balanced with doubt, the courts of the United States, for the sake of harmony, "will lean to an agreement of views with the State courts." To that effect are *Burgess* v. *Seligman*, 107 U. S. 20, 33, 34; *Pana* v. *Bowler*, 107 U. S. 529, and *Oates* v. *National Bank*, 100 U. S. 239, 246, *and authorities cited in each case.* But in the present suit and upon the particular question now under consideration it is, perhaps, immaterial that the learned Supreme Court of Texas did not proceed on grounds consistent with the settled doctrines of this court on questions of commercial law; for, that court having jurisdiction of the case before it the question to be met is whether the judgment actually rendered by that court in *Ball, Hutchings & Co.* v. *Presidio County*, as matter of law, concludes the plaintiff in this suit.

In determining that question certain facts may be taken as

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established by the proof introduced by the county and which it deemed material, namely: 1. That the suit in the state court was upon interest coupons, and not upon the bonds to which they were attached. 2. That on December 10th, 1886, after the bonds were issued, F. M. Ball purchased those here in suit from the contractor to whom they were delivered on account of *furniture* supplied for the courthouse, and on the same day one League purchased from Ball four of the bonds. 3. Both Ball and League purchased, in good faith, at par and interest, without notice of any facts impeaching the validity of the bonds. 4. That their purchases were before the action in the state court, which was not commenced until August 15th, 1902. 5. That when that suit was begun, the bonds, so far as appears from the record, belonged to Ball and League, and remained under their control during the pendency of that suit and were not produced in court. 6. Ball, Hutchings & Co., the plaintiffs in that suit, were only the agents for the collection of the interest coupons. 7. It does not appear from the present record when the Noel-Young Bond & Stock Co., the present plaintiff, became the holder and owner of the bonds, whether during the pendency of the suit in the state court or after the final judgment on March 4th, 1895 in the Supreme Court of Texas.

The argument in support of the conclusiveness of the judgment necessarily rests on the ground that the suit on the coupons created a *lis pendens* that prevented any one from purchasing the bonds except subject to such judgment as might be rendered on that suit. But, clearly, the negotiability of the bonds was not destroyed by the mere bringing or pendency of the suit on the coupons, although the issue in that suit as to the validity of the coupons may have incidentally involved an inquiry as to the validity of the bonds to which they were attached. It may be that the holder of negotiable coupons sued on, being also, at the time, the holder and owner of the bonds, may be concluded, *as between him and the county*, in a subsequent suit on the bonds, by a previous judgment on the coupons in the suit, in which the coupons were held invalid be-

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cause attached to invalid bonds. But one who became a *bona fide* purchaser for value of the bonds, after the institution of the suit on the coupons, not being himself a party to or having notice of that suit, will not be concluded by the judgment as to the coupons. A suit on coupons and a suit on the bonds are based on different causes of action. The coupons and bonds were capable of separate ownership and of separate suits. Judgment might be rendered on coupons without producing the bonds to which they were originally attached. In *Nesbit* v. *Riverside Independent District*, 144 U. S. 610, 611, 618, which was an action on county bonds, and in which it was a question whether a judgment in a former suit on coupons of certain bonds of the same issue barred an action on the bonds, this court said: "Now, the present suit is on causes of action different from those presented in the suit at Des Moines. Bonds 16, 17 and 18 were not presented or known in that suit; and while bonds 14 and 15 were presented, alleged to be the property of plaintiff, and judgment asked upon six coupons attached thereto, yet the cause of action on the six coupons is distinct and separate from that upon the bonds or the other coupons. Each matured coupon is a separable promise, and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be maintained. So, while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond, as though the two promises were placed in different instruments, upon different paper." To the same effect is *Edwards* v. *Bates Co.*, 163 U. S. 269, 271. A purchaser, when buying the bonds, was not bound at his peril to know of the pendency of the suit on the coupons. He could buy without being concluded by a judgment rendered on coupons involved in a suit to which he was not a party, and of the pendency of which he had no notice.

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An instructive case on this subject is *County of Warren* v. *Marcy*, 97 U. S. 96. That was an action on coupons attached to negotiable bonds issued by a county. The facts on which the defense was based were these: A taxpayer brought a suit against a county on behalf of himself and all other taxpayers for an injunction to prevent the county from making a subscription to the stock of a certain railroad company. A temporary injunction was granted, which was afterwards dissolved, and the bill was dismissed. The plaintiff appealed to the Supreme Court of the State, which reversed the judgment and a decree was ordered to be entered, and was entered, enjoining the county from making the proposed subscription. Pending the suit and after the dissolution of the temporary injunction, and while the case was pending on appeal, the county made the subscription sought to be enjoined, and issued and delivered to the railroad company the bonds to which the coupons there in suit were attached. Marcy purchased some of the bonds for value before maturity, and without any actual notice of their alleged invalidity, or of any suit in relation thereto. The question in the case was whether the pendency of the equity suit to prevent the subscription and an issue of bonds was constructive notice to all persons of the invalidity of the bonds issued in payment for the subscription.

This court, speaking by Mr. Justice Bradley, held the bonds to be valid in the hands of a *bona fide* purchaser for value upon these grounds, saying: "That if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, by the authorities whose primary duty it is to ascertain it." On the question of *lis pendens* the court said: "It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril,

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purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent, in one of the leading cases on the subject in this country, and has been confirmed by many subsequent decisions"—citing *Murray* v. *Ballou*, 1 Johns. (N. Y.) Ch. 566; *Murray* v. *Lylburn*, 2 Johns. Ch. 441; *Kieffer* v. *Ehler*, 18 Pa. St. 388; *Winston* v. *Westfeldt*, 22 Alabama, 760; *Stone* v. *Elliott*, 11 Ohio St. 252; *Mims* v. *West*, 38 Georgia, 18; *Leitch* v. *Wells*, 48 N. Y. 585; *Durant* v. *Iowa County*, 1 Woolw. 69. The court also referred to *City of Lexington* v. *Butler*, 14 Wall. 283, saying: "In that case irregularities had occurred in the preliminary proceedings, and the city authorities refused to issue the bonds. A *mandamus* was applied for by the railroad company, for whose use the bonds were intended; and judgment of *mandamus* was rendered compelling the city to issue them, and it issued them accordingly. Subsequently, this judgment was reversed by the Court of Appeals of Kentucky, and an injunction was obtained to prevent the railroad company from parting with the bonds. The injunction was not obeyed; the bonds were negotiated whilst proceedings were still pending, and were purchased by the plaintiff for value before maturity, without any knowledge of these circumstances. This court held that the bonds were valid in his hands . . . Whilst the doctrine of constructive notice arising from *lis pendens*, though often severe in its application, is, on the whole, a wholesome and necessary one, and founded on principles affecting the authoritative administration of justice, the exception to its application is demanded by other considerations equally important, as affecting the free operations of commerce, and that confidence in the instruments by which it is carried on, which is so necessary in a business community." In *Orleans* v. *Platt*, 99 U. S. 676, 682, the court said: "The doctrine of *lis pendens* has no application to commercial securities." See also *County of Cass* v. *Gillette*, 100 U. S. 585, 593, and

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Carroll County v. *Smith*, 111 U. S. 556, 562, to the same effect.

We hold that upon the present record the plaintiff company is to be taken as having purchased the bonds here in suit before maturity and for value, without notice of any circumstances indicating that their validity was or could be impeached; consequently, the judgment in favor of the county in the suit brought in the state court by Ball, Hutchings & Co. on some of the coupons of the bonds now in suit—in which suit the present plaintiff company was not a party and of which it is not shown to have had notice—does not preclude a judgment in its favor against the county on the bonds.

For the reasons stated, the judgment of the Circuit Court of the United States must be affirmed.

It is so ordered.

THE CHIEF JUSTICE dissents.

MOYER *v.* PEABODY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 55. Argued January 5, 6, 1909.—Decided January 18, 1909.

What is due process of law depends on circumstances, and varies with the subject-matter and necessities of the situation.

An officer of a State interfering with an individual's rights in an unconstitutional manner derives no protection from personal liability on account of his office.

The declaration of the governor of a State that a state of insurrection exists is conclusive.

Where the constitution and laws of a State give the governor power to suppress insurrection by the National Guard, as is the case in Colorado, he may also seize and imprison those resisting, and is the final judge of the necessity for such action; and when such an arrest is made

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in good faith he cannot be subjected to an action therefor after he is out of office on the ground that he had not reasonable cause.

Public danger warrants the substitution of executive for judicial process; and the ordinary rights of individuals must yield to what the executive honestly deems the necessities of a critical moment.

Without deciding other questions as to the jurisdiction of the Circuit Court, *held* that the declaration of plaintiff in error in this case against the former governor of Colorado for arrest and detention during a period of insurrection does not give the Circuit Court jurisdiction thereof under § 629 or § 1979, Rev. Stat., as a suit authorized by law brought to redress the deprivation of a constitutional right.

148 Fed. Rep. 870, affirmed.

THE facts are stated in the opinion.

Mr. Edmund F. Richardson, with whom *Mr. Horace N. Hawkins* was on the brief, for plaintiff in error:

The Circuit Court of the United States has jurisdiction to entertain a controversy, arising under § 1979, Rev. Stat., for the infringement of a guaranty secured by the Fourteenth Amendment.

An allegation in the complaint showing that one has been deprived of the constitutional guaranty of liberty, without due process of law, setting up and defining in his complaint what constitutes due process of law in the state courts, coupled with an averment that those state courts were in the untrammeled exercise of their jurisdiction, except in so far as they were interfered with by the defendants themselves, gives to the Federal courts a jurisdiction to determine whether or not the statement of facts contained in the complaint is true, and if it is true, a right and duty devolves upon those courts to remedy that deprivation. *Hemsley* v. *Meyer*, 45 Fed. Rep. 283.

It is state action of a particular character that is prohibited by the Fourteenth Amendment. Individual invasion of individual rights is not the subject-matter of the amendment. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation, but to provide modes of relief against state legislation or

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state action of the kind referred to. *Virginia* v. *Rives*, 100 U. S. 313; *Civil Rights Cases*, 109 U. S. 3; *Ex parte Plessy*, 45 La. Ann. 80; *Logan* v. *United States*, 144 U. S. 263; *Hall* v. *Virginia*, 8 Wall. 168; *Legrand* v. *United States*, 12 Fed. Rep. 577; *Miller* v. *New York*, 13 Blatchf. 469.

What these defendants did appears to have been done by them as officers of the State. That action has met the sanction of the majority opinion of the Supreme Court of the State. If state action be obnoxious to the Fourteenth Amendment, the Circuit Court has jurisdiction to uphold that Amendment and to maintain the paramount law of the land, and the duty devolves upon it to declare what the Constitution means or to follow the declarations already made by this court upon that subject.

The defendants cannot be relieved from the consequences of their wrongful acts by reason of their being, at the time, officers of the State. *Ex parte Virginia*, 100 U. S. 339; *Ames* v. *Kansas*, 111 U. S. 449, 470; *Poindexter* v. *Greenhow*, 114 U. S. 270, 285; *Yick Wo* v. *Hopkins*, 118 U. S. 356, and cases there cited.

The action of the defendants in imprisoning Moyer under the circumstances recited in the complaint was in violation of the Fourteenth Amendment. See *Ex parte Milligan*, 4 Wall. 2; *Ex parte Merryman*, 9 Am. L. R. 524; *S. C.*, 17 Fed. Cas. No. 9,487.

No officer can escape liability for causing the arrest and imprisonment of a civilian who is not amenable to military law. The utmost that he can do in a state of war is to arrest such civilian and turn him over to the civil authorities, if the civil authorities are in operation; if not, he must be turned over to the civil authorities the minute that such authorities are in operation, and the first duty of the military is to see that the civil authorities are placed in operation. *McCall* v. *McDowell*, Deady, 233; *McCall* v. *McDowell*, 1 Abbott, 212; *Ex parte Merryman*, Taney, 246; *S. C.*, 9 Am. L. R. 524; *S. C.*, 17 Fed. Cas., No. 9,487; *Cochran & Thompson* v. *Tucker*, 3 Coldwell, 186; *Caperton* v. *Martin*, 4 W. Va. 138; *S. C.*, 6 Am. Rep. 270.

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Mr. Horace Phelps, with whom *Mr. William H. Dickson*, Attorney General of the State of Colorado, and *Mr. John M. Waldron* were on the brief, for defendants in error:

The judicial power of the United States does not extend to this controversy. This is not a case arising under the Federal Constitution nor under any law of the United States. *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Harris*, 106 U. S. 629; *Virginia* v. *Rives*, 100 U. S. 313, 334; *Barney* v. *City of New York*, 193 U. S. 430, 437; *St. L., I. M. & S. Ry. Co.* v. *Davis*, 132 Fed. Rep. 629, 639; *City of Dawson* v. *Trust Co.*, 197 U. S. 178; *Hodges* v. *United States*, 203 U. S. 1, 14, 15, 16; *Carter* v. *Greenhow*, 114 U. S. 317; *New Orleans* v. *Benjamin*, 153 U. S. 411, 424.

The amended complaint does not state a cause of action. The acts complained of were done by the defendants as officials, in pursuance of their duty to the State, and well within their lawful powers. *Luther* v. *Borden*, 7 How. 1, 45, 46; 2 Hare, American Constitutional Law, p. 969; *Griffin* v. *Wilcox*, 21 Indiana, 370, 380; *In re Boyle*, 6 Idaho, 609; *Houston* v. *Moore*, 5 Wheat. 1, 54; Sutherland, Notes on the United States Constitution, pp. 202, 458.

The questions sought to be litigated in this case are purely political, and Federal courts are not clothed by the Constitution or laws of the United States with any jurisdiction over such questions. Black on the Constitution, pp. 64, 85, 86; 1 Bryce on American Constitution, p. 262; *Phillips* v. *Hatch*, 1 Dillon, 571; *Keeley* v. *Sanders*, 99 U. S. 441; *In re Moyer*, 35 Colorado, 159.

The Governor of Colorado had power to determine the existence of a state of insurrection in a given locality in the State, and, as an incident thereto, the power to determine what persons within the insurrectionary district are to be treated as aiders or abettors of such insurrection. This has been determined by the Supreme Court of Colorado, and this construction is binding upon the Federal courts. *Dreyer* v. *Illinois*, 187 U. S. 71; *Reetz* v. *Michigan*, 188 U. S. 505; *Murray* v. *Louisiana*,

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163 U. S. 101; 1 Kent's Commentaries, p. 283; Story on the Constitution, § 1491.

No invasion of any right under the Federal Constitution is shown. Neither the arrest of plaintiff in error nor the adjudication of the lawfulness thereof by the Supreme Court of Colorado constituted an infringement of any guaranty of the Federal Constitution. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *United States* v. *Ju Toy*, 198 U. S. 253, 263; *Clearing House* v. *Coyne*, 194 U. S. 497; *In re Bergen*, 2 Hughes, 513.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action, brought by the plaintiff in error against the former Governor of the State of Colorado, the former Adjutant General of the National Guard of the same State, and a captain of a company of the National Guard, for an imprisonment of the plaintiff by them while in office. The complaint was dismissed on demurrer, and the case comes here on a certificate that the demurrer was sustained solely on the ground that there was no jurisdiction in the Circuit Court. 148 Fed. Rep. 870.

The complaint alleges that the imprisonment was continued from the morning of March 30, 1904, to the afternoon of June 15, and that the defendants justified under the constitution of Colorado making the Governor commander-in-chief of the state forces, and giving him power to call them out to execute laws, suppress insurrection and repel invasion. It alleges that his imprisonment was without probable cause, that no complaint was filed against the plaintiff, and that (in that sense) he was prevented from having access to the courts of the State, although they were open during the whole time; but it sets out proceedings on *habeas corpus*, instituted by him before the Supreme Court of the State, in which that court refused to admit him to bail and ultimately discharged the writ. *In re Moyer*, 35 Colorado, 154 and 159. In those proceedings it appeared that the Governor had declared a county to be in a state of insurrection, had called out troops to put down the trouble, and

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had ordered that the plaintiff should be arrested as a leader of the outbreak, and should be detained until he could be discharged with safety, and that then he should be delivered to the civil authorities to be dealt with according to law.

The jurisdiction of the Circuit Court, if it exists, is under Rev. Stat. § 629, Sixteenth. That clause gives original jurisdiction "of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." The complaint purports to be founded upon the Constitution and on Rev. Stat. § 1979, which authorizes suit to be brought for such deprivation as above described. Therefore the question whether the complaint states a case upon the merits under § 1979 in this instance is another aspect of the question whether it states a case within the jurisdiction of the court under § 629, cl. 16. Taken either way, the question is whether this is a suit authorized by law, that is, by § 1979, or the Constitution, or both.

The plaintiff's position, stated in a few words, is that the action of the Governor, sanctioned to the extent that it was by the decision of the Supreme Court, was the action of the State and therefore within the Fourteenth Amendment; but that if that action was unconstitutional the Governor got no protection from personal liability for his unconstitutional interference with the plaintiff's rights. It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of that fact. It seems to be admitted also that the arrest alone would not necessarily have given a right to bring this suit. *Luther* v. *Borden*, 7 How. 1, 45, 46. But it is said that a detention for so many days, alleged to be without probable cause, at a time when the courts were open, without an attempt to bring the plaintiff before them, makes a case on which he has a right to have a jury pass.

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We shall not consider all of the questions that the facts suggest, but shall confine ourselves to stating what we regard as a sufficient answer to the complaint, without implying that there are not others equally good. Of course the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus summary proceedings suffice for taxes, and executive decisions for exclusion from the country. *Murray* v. *Hoboken Land & Improvement Co.*, 18 How. 272; *United States* v. *Ju Toy*, 198 U. S. 253, 263. What, then, are the circumstances of this case? By agreement the record of the proceedings upon *habeas corpus* was made part of the complaint, but that did not make the averments of the petition for the writ averments of the complaint. The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him.

It would seem to be admitted by the plaintiff that he was president of the Western Federation of Miners, and that, whoever was to blame, trouble was apprehended with the members of that organization. We mention these facts not as material, but simply to put in more definite form the nature of the occasion on which the Governor felt called upon to act. In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State. The constitution is supplemented by an act providing that "when an invasion of or insurrection in the State is made or threatened the Governor shall order the National Guard to repel or suppress the same." Laws of 1897, c. 63, Art. 7, § 2, p. 204. That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not nec-

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essarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief. If we suppose a Governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the Governor to revision by a jury. It is not alleged that his judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end.

No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event. *Lawrence* v. *Minturn*, 17 How. 100 110; *The Star of Hope*, 9 Wall. 203; *The Germanic*, 196 U. S. 589, 594, 595. When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See *Keely* v. *Sanders*, 99 U. S. 441, 446. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the Fourteenth Amend-

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ment, we are of opinion that the same is true of a law authorizing by implication what was done in this case. As we have said already, it is unnecessary to consider whether there are other reasons why the Circuit Court was right in its conclusion. It is enough that in our opinion the declaration does not disclose a "suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States." See *Dow* v. *Johnson*, 100 U. S. 158.

Judgment affirmed.

MR. JUSTICE MOODY took no part in the decision of this case.

WATERS-PIERCE OIL COMPANY *v.* STATE OF TEXAS (NO. 1).

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 359. Argued November 2, 3, 1908.—Decided January 18, 1909.

The jurisdiction of this court, under § 709 Rev. Stat., to review the proceedings of state courts is limited to specific instances of denials of Federal rights specially set up in and denied by the state court.

This court does not review, but accepts as conclusive the findings of facts made by the state court.

Although the state court may incorrectly charge as to certain provisions of a statute if the jury finds that defendant has violated those provisions and also other provisions not involving any Federal question, and only one penalty is assessed, the judgment rests on a non-Federal ground sufficient to sustain it, and this court has not jurisdiction to review it under § 709 Rev. Stat.

Although an agreement to violate the anti-trust law of a State may be made outside of the State, if the parties thereto or their agents execute it, or attempt so to do, within the State, they are under the jurisdiction of the State and their conviction for such acts is not without due process of law.

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States having power to prevent unlawful combinations in restraint of trade may provide the procedure for enforcing the same, subject only to the qualification that such procedure must not deny or conflict with fundamental or constitutional rights.

Even though it would be giving a penal statute a retroactive effect to make it apply to an unlawful agreement executed prior to the passage of the act by defendant's predecessor in interest, defendant is subject to conviction for violating the act after its enactment by making itself a party to and carrying out its illegal provisions.

Where defendant has had a fair trial and the question of liability has been submitted to a jury and the judgment reviewed and sustained by an appellate court, this court will not hold that there has been a deprivation of due process of law because the state statute permitted, and the court charged, that conviction could be had not only for acts accomplishing, but also for those tending or reasonably calculated to bring about, the things prohibited.

The anti-trust laws of Texas involved in this case are not unconstitutional as depriving any one of due process of law because vague and indefinite as prohibiting acts which "tend" or are "reasonably calculated" to restrain trade and prevent competition.

The fixing of punishment for crime and penalties for unlawful acts is within the police power of the State, and this court cannot interfere with state legislation in fixing fines, or judicial action in imposing them, unless so grossly excessive as to amount to deprivation of property without due process of law.

Where a state anti-trust law fixed penalties at $5,000 a day, and, after verdict of guilty for over 300 days, a defendant corporation was fined over $1,600,000, this court will not hold that the fine is so excessive as to amount to deprivation of property without due process of law where it appears that the business was extensive and profitable during the period of violation, and that the corporation has over $40,000,000 of assets and has declared dividends amounting to several hundred per cent.

106 S. W. Rep. 918, affirmed.

THE facts are stated in the opinion.

Mr. Moorfield Storey, Mr. E. B. Perkins and *Mr. Henry Samuel Priest*, with whom *Mr. J. L. Thorndike* was on the brief, for plaintiff in error:

By the proceedings in the Texas courts defendant has been

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subjected to the penalties of the act of 1899 by reason of an agreement made by another company, the old Waters-Pierce Company, with the Standard Oil Company, confining the business of those two companies to different parts of the United States. This agreement was made in 1878, many years before the act was passed. The defendant cannot be so subjected to penalties without giving a retroactive effect to the act and depriving the defendant of its property without due process of law.

The defendant did not by acquiring the business and property of the old Waters-Pierce Company succeed to any of the liabilities of that company. *Armour* v. *Bement's Sons*, 123 Fed. Rep. 56.

The state courts by imposing on the defendant a liability on account of an agreement made by the old company have undertaken to deprive the defendant of its property without due process of law. *Woodward* v. *Central Vermont Ry. Co.*, 180 Massachusetts, 599; *Davidson* v. *New Orleans*, 96 U. S. 102.

But if the defendant is to be regarded as the old company in a new form, then the question is to be treated in the same manner as if the old company were sued for penalties for having entered into the agreement for a division of territory in 1878 and remaining a party to it on and after June 1, 1900. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 36, 39. And in 1878 there was no law in Texas forbidding such an agreement. *Mogul Steamship Co.* v. *McGregor*, A. C. 1892, 39.

Although the words of the act refer to the future, yet as the state courts gave it retroactive effect the defendant has thereby been deprived of its constitutional right. *General Oil Co.* v. *Crain*, 209 U. S. 211, 228.

The agreement was not only made before the act of 1899 was passed, but it was made outside of the State of Texas, and it did not provide that either company should do anything in Texas. By imposing penalties on the defendant by reason of such an agreement the State is punishing an act done out of its jurisdiction and so depriving the defendant of its property with-

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out due process of law. *State* v. *Lancashire Ins. Co.*, 66 Arkansas, 466; *O'Neil* v. *Vermont*, 144 U. S. 332, 341; *United States* v. *Thayer*, 209 U. S. 39, 44; *In re Palliser*, 136 U. S. 257, 266.

The only provision of the agreement that affected Texas was that the Standard Oil Company should not do business in that State, which it could not do without carrying its oil into that State for the purpose and thereby engaging in interstate commerce. The State had no authority to regulate such commerce by imposing penalties for entering into contracts relating to it. *General Oil Co.* v. *Crain*, 209 U. S. 228, 229; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Leisy* v. *Hardin*, 135 U. S. 100, 119; *Rearick* v. *Pennsylvania*, 203 U. S. 507.

The defendant has also been subjected to the penalties of the act of 1899 for the doings of the Standard Oil Company in acquiring shares in the defendant company, in which the defendant itself had no part. Such an imposition of penalties upon the defendant for the acts of somebody else is a taking of its property without due process of law. *Case* v. *Bank*, 100 U. S. 446; *Oliver* v. *Bank*, 1 Ch. 615, 619, 629; Lindley on Companies (6th ed.), 81; *Davidson* v. *New Orleans*, 96 U. S. 102; *Hobson* v. *Middleton*, 9 B. & C. 303.

This acquisition of the shares also took place outside of Texas and under the laws of Missouri, and was a matter to which the State of Texas could not constitutionally extend its jurisdiction. *State* v. *Lancashire Ins. Co.*, 66 Arkansas, 466.

By the course that has been pursued, the jury have been enabled to convict the defendant and impose penalties upon it on account of a combination formed outside of the State of Texas which has not been found to have regulated any prices in Texas or even to have had any effect upon them. As this is a matter in which the State of Texas has no authority, the defendant is by this means deprived of its property without due process of law.

Any combination effected by the acquisition of shares by the Standard Oil Company was effected when that company first acquired the shares in the old Waters-Pierce Company, long

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before the act of 1899 was passed. The imposition of penalties on this ground therefore gives the act the effect of an *ex post facto* law.

In like manner the defendant has been subjected to the penalties of the act of 1903 for what the Standard Oil Company did in acquiring the shares. This has been done on the ground that defendant thereby entered into a combination, and that thereby the two companies were placed under the same management or control, and that the Standard Oil Company had acquired the shares with the purpose on the part of its own officers of lessening competition in Texas. The constitutional rights of the defendant have been violated in the three ways previously mentioned, by imposing penalties on the defendant for the acts of somebody else, for acts done outside of Texas, and for acts done before the statute. *General Oil Co.* v. *Crain*, 209 U. S. 211, 228; *Kring* v. *Missouri*, 107 U. S. 228.

Both the acts of 1899 and 1903 are too indefinite and uncertain in their terms to make it an offense to do what the defendant has been found by the jury to have done, and that the imposition of penalties for doing that deprives the defendant of its property without due process of law. *Montana* v. *Rice*, 204 U. S. 291, 299; *Sullivan* v. *Texas*, 207 U. S. 422; *Tozer* v. *United States*, 52 Fed. Rep. 917; *Ex parte Jackson*, 45 Arkansas, 158; *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Kentucky, 132; *S. C.*, 35 S. W. Rep. 129; *Louisville & Nashville R. R. Co.* v. *R. R. Commission*, 19 Fed. Rep. 679, 691; *Railroad Commission Cases*, 116 U. S. 336; *United States* v. *Brewer*, 139 U. S. 278.

The penalties that have been imposed upon the defendant are also so excessive as to constitute a deprivation of its property without due process of law. While the Eighth Amendment against excessive bail and fines may not apply to the different States, *Pervear* v. *Commonwealth*, 5 Wall. 475; *O'Neil* v. *Vermont*, 144 U. S. 332, the prohibition is one of fundamental rights of life, liberty and property, the observance of which by the

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States, as well as by the general government, is essential to due process of law, and is enforced by the Fourteenth Amendment. *O'Neil* v. *Vermont*, 144 U. S. 339–341, 370. For instances of penalties held to be excessive, see *State* v. *Galveston, Harrisburg, San Antonio Ry. Co.*, 100 Texas, 153, 175; *S. C.*, 97 S. W. Rep. 71; *State* v. *Whitaker*, 48 La. Ann. 527. See also *Porter* v. *Dawson Bridge Co.*, 157 Pa. St. 374–379.

The arbitrary admission of evidence that could have no possible connection with the issues in the case and could only confuse and excite the prejudice of the jury; directing the jury, therefore, to consider such evidence as tending to prove some of the issues in favor of the State, and directing them to bring in a verdict for the State if they found facts of which there was no evidence whatever, amounted to a denial of a trial according to law, and the judgment deprived the defendant of its property without due process of law.

To bring the case under *In re Converse*, 137 U. S. 631; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 566; *Smiley* v. *Kansas*, 196 U. S. 453, there must be, not only the form, but the substance, of a trial according to the regular course of procedure, and not a reckless disregard of defendant's rights. *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 565; *Fayerweather* v. *Ritch*, 195 U. S. 297; *Patterson* v. *Colorado*, 205 U. S. 461.

The trial must be according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. In determining what is due process of law regard must be had to substance, not to form. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 234.

The prohibitions of the Fourteenth Amendment extend to all acts of the State, whether done through its legislative, executive or judicial authorities. *Scott* v. *McNeal*, 154 U. S. 45; *Waterworks Co.* v. *Owensboro*, 200 U. S. 45; *Londoner* v. *Denver*, 210 U. S. 386.

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It cannot reasonably be said that any of the doings or agreements of the old company had any such fair relation to the question whether the defendant had violated the Texas anti-trust laws, as to make it evidence upon that question. *People* v. *Cannon*, 139 N. Y. 43, 45; *Commonwealth* v. *Anselvitch*, 186 Massachusetts, 378, 379.

The defendant did not succeed to the liabilities or obligations of the old company, *Armour* v. *Bement's Sons*, 123 Fed. Rep. 56, and the legislature could not have imposed those liabilities or obligations upon the defendant. *Woodward* v. *Central Vermont Ry. Co.*, 180 Massachusetts, 599.

The permit was a contract with the State for valuable consideration under which the defendant was entitled to do business in Texas for ten years, and the revocation of the permit without convicting the defendant of misconduct by due process of law was, like the imposition of the penalties, a deprivation of its property without due process of law. *American Smelting Co.* v. *Colorado*, 204 U. S. 103; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 47.

The order appointing the receiver, being dependent on the judgment, must fall with the judgment.

Upon the reversal of the judgment, the defendant is entitled to be put in the same position as if there had never been any such judgment. 2 Wms. Saund. 101 *gg;* 2 Tidd's Practice (9th ed., 1828), 1186, 1187; Tidd's Forms (1828), 540, 556–558.

After the judgment for penalties had been superseded by the appeal and bond, the judge had no authority to complete the appointment of a receiver, and the order completing such appointment deprived the defendant of its property without due process of law. A *supersedeas* stops all sort of proceedings. *Smith* v. *Nicholson*, 2 Stra. 1186; *Sampson* v. *Brown*, 2 East, 439.

So, by the laws of Texas, as declared by its Supreme Court, the judge had no authority to go on and complete the appointment of the receiver after the original judgment had been superseded. In doing so he acted arbitrarily and without au-

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thority of law, and, if the appointment is allowed to be put in force, the defendant will be deprived of its property without due process of law.

The judge and officers of the court in completing the appointment of the receiver acted as representatives of the State, and their acts were those of the State. *Scott* v. *McNeal*, 154 U. S. 45; *Waterworks Co.* v. *Owensboro*, 200 U. S. 45; *Londoner* v. *Denver*, 210 U. S. 386.

Mr. R. V. Davidson, Attorney General of the State of Texas, *Mr. R. L. Batts* and *Mr. G. W. Allen*, with whom *Mr. Jewel P. Lightfoot*, *Mr. John W. Brady* and *Mr. T. W. Gregory* were on the brief, for defendant in error:

No substantial Federal question requiring the exercise of the jurisdiction of this court is involved in this case. *Arkansas Southern R. R. Co.* v. *German Bank*, 207 U. S. 275; *Leathe* v. *Thomas*, 207 U. S. 98; *Stickney* v. *Kelly*, 209 U. S. 422; *Thomas* v. *Iowa*, 209 U. S. 263; *Bachtel* v. *Wilson*, 204 U. S. 36.

Neither the act of 1899 nor the act of 1903 is an *ex post facto* law, nor is either retroactive, nor was either given a retroactive effect in this case. *Glue Co.* v. *Glue Co.*, 187 U. S. 611; *United States* v. *Trans-Missouri Traffic Association*, 166 U. S. 290; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505; *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 646; *Louisville & Nashville Ry. Co.* v. *Kentucky*, 161 U. S. 677; *State* v. *Insurance Co.*, 94 U. S. 535; *Mugler* v. *Kansas*, 123 U. S. 668; *Waters-Pierce Oil Co.* v. *State*, 44 S. W. Rep. 941; *State* v. *Missouri, Kansas & Texas Ry. Co.*, 91 S. W. Rep. 214; *Ford* v. *Milk Shippers' Assn.*, 27 L. R. A. 298.

Neither the act of 1899 nor the act of 1903, as construed by the highest state courts of Texas, denies to plaintiff in error the equal protection of the law. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Smiley* v. *Kansas*, 196 U. S. 447; *Mugler* v. *Kansas*, 123 U. S. 665; *Gundling* v. *Chicago*, 177 U. S. 188; *Soon Hing* v. *Crowley*, 113 U. S. 708; *Nutting* v. *Massachusetts*, 183 U. S. 553; *Wurts* v. *Hoagland*, 114 U. S. 615; *Duncan* v.

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Missouri, 152 U. S. 382; *Eldridge* v. *Trezevant*, 160 U. S. 469; *Lowe* v. *Kansas*, 163 U. S. 88; *Missouri Railway Co.* v. *Mackey*, 127 U. S. 209; *Pacific Express Co.* v. *Seibert*, 142 U. S. 352; *Powell* v. *Pennsylvania*, 127 U. S. 687; *American Sugar Co.* v. *Louisiana*, 179 U. S. 95; *Booth* v. *Illinois*, 184 U. S. 429; *Capital City Drug Co.* v. *Ohio*, 183 U. S. 246.

Neither the act of 1899 nor the act of 1903 deprived plaintiff in error of its property without due process of law.

There was a petition, filed in a court of competent jurisdiction, setting out in detail the things done by plaintiff in error, and laws it had violated. An answer was filed setting up the defenses in detail, and there was a trial before the court and a jury, lasting ten days, and a great mass of testimony introduced by both sides, and the jury found the plaintiff in error guilty, and the court entered a judgment in accordance therewith. The case was thereupon carried to the Court of Civil Appeals in the regular way, and after a full hearing and careful consideration by that court, it affirmed the judgment of the trial court. *Simon* v. *Craft*, 182 U. S. 427; *Remington Paper Co.* v. *Watson*, 173 U. S. 443; *New Orleans Waterworks* v. *Louisiana*, 185 U. S. 336; *Railway Co.* v. *Missouri*, 156 U. S. 478; *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389; *Murray* v. *Hoboken Land Co.*, 18 How. 272; *New Orleans Debenture Redemption Co.* v. *Louisiana*, 180 U. S. 320; *Rothschild* v. *Knight*, 184 U. S. 334; *Consolidated Rendering Company* v. *Vermont*, 207 U. S. 541; *Cosmopolitan Club* v. *Virginia*, 208 U. S. 384; *Caldwell* v. *Texas*, 137 U. S. 697; *Miller* v. *Texas*, 153 U. S. 539; *Minder* v. *Georgia*, 183 U. S. 559.

If there was any error in the charge of the trial court upon the matter of stock-ownership the error is immaterial, and any Federal question that might have been predicated of it has been eliminated from the case by the action of the Court of Civil Appeals in basing a judgment of affirmance upon other grounds. *Missouri, Kansas & Texas Ry. Co.* v. *Ferris*, 179 U. S. 602; *Hammond* v. *Johnson*, 142 U. S. 73; *Harrison* v. *Morton*, 171 U. S. 38; *Klinger* v. *Missouri*, 13 Wall. 257; *Ken-*

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nard v. *Louisiana*, 92 U. S. 480; *Lent* v. *Tillson*, 140 U. S. 316; *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226; *Glue Co.* v. *Glue Co.*, 187 U. S. 611; *United States* v. *Trans-Missouri Traffic Assn.*, 166 U. S. 290; *State* v. *Missouri, Kansas & Texas Ry. Co.*, 91 S. W. Rep. 214; *Baldwin* v. *Kansas*, 129 U. S. 52.

The combination effected between the Standard Oil Company and the Waters-Pierce Oil Company by the acquisition of the stock of the latter by the former for the purposes for which the acquisition was made and with the effect intended violated the laws of Texas and the infliction of penalties therefor would not have given the laws either an extraterritorial effect, or a retroactive effect, or otherwise have violated the Constitution of the United States.

Neither the act of 1899 nor that of 1903 is vague, uncertain or indefinite. *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Freight Ass'n*, 166 U. S. 325; *Northern Securities Case*, 197 U. S. 244; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Smiley* v. *Kansas*, 196 U. S. 474; *State of Texas* v. *Laredo Ice Co.*, 73 S. W. Rep. 952; *Missouri, Kansas & Texas Ry. Co.* v. *State*, 91 S. W. Rep. 214; *San Antonio Gas Co.* v. *State*, 54 S. W. Rep. 289; *People* v. *Sheldon*, 139 N. Y. 251; *Drake* v. *Seibold*, 81 Hun, 178; *People* v. *North River Ref. Co.*, 121 N. Y. 582.

The jurisdiction of the legislature of Texas to pass laws prohibiting the making of agreements or the forming of combinations in restraint of trade in Texas, or the carrying out in Texas of such agreements or combinations, is absolute and complete. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Smiley* v. *Kansas*, 196 U. S. 447; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Mugler* v. *Kansas*, 123 U. S. 665; *Slaughter House Cases*, 16 Wall. 63; *Barbier* v. *Connolly*, 113 U. S. 31; *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 410; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Waters-Pierce Oil Co.* v. *State*, 44 S. W. Rep. 936; *Anheuser-Busch Brewing Assn.* v. *Houck*, 27 S. W. Rep. 692; *State* v. *Laredo Ice Co.*, 73 S. W. Rep. 952; *Coal Co.* v. *Lawson*,

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34 S. W. Rep. 919; *State* v. *Missouri, Kansas & Texas Ry. Co.*, 91 S. W. Rep. 214; *People* v. *Sugar Trust*, 121 N. Y. 582; *State* v. *Standard Oil Co.*, 49 Ohio St. 137; *Harding* v. *American Glucose Co.*, 182 Illinois, 551; *Arnot* v. *Pittson Coal Co.*, 68 N. Y. 558.

Having complete jurisdiction to pass laws prohibiting the making of agreements or the forming of combinations in restraint of trade in Texas, or the carrying out in Texas of such agreements or combinations, the legislature has the absolute right to prescribe the punishment for a violation of such laws, and the laws under consideration are open to no constitutional objections on account of the penalties. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Ripley* v. *Texas*, 193 U. S. 504; *Ohio* v. *Lloyd*, 194 U. S. 445; *Marvin* v. *Trout*, 199 U. S. 212; *McCray* v. *United States*, 195 U. S. 27; *Devine* v. *Los Angeles*, 202 U. S. 302; *Railway Co.* v. *Hume*, 115 U. S. 512; *Tel. Co.* v. *Indiana*, 165 U. S. 304; *Coffey* v. *Harlan County*, 204 U. S. 659; *Railway Co.* v. *Seegers*, 207 U. S. 73; *N. W. L. I. Co.* v. *Riggs*, 203 U. S. 251; *O'Neil* v. *Vermont*, 144 U. S. 323.

MR. JUSTICE DAY delivered the opinion of the court.

This case was begun in the state Circuit Court of Travis County, Texas, to forfeit the permit of the plaintiff in error, the Waters-Pierce Oil Company, a corporation of the State of Missouri, to conduct business in the State of Texas, and to assess penalties against it for violation of the anti-trust laws of that State. The prosecution was under two laws of the State, one of 1899 and one of March 31, 1903. The proceeding was brought by the Attorney General of Texas and the county attorney of Travis County, to recover penalties, under the act of 1899, from the thirty-first day of May, 1900, until the thirty-first day of March, 1903, at the rate of $5,000 per day, and under the act of 1903, from the thirty-first of March, 1903, till the twenty-ninth of April, 1907, at the rate of $50 per day, and to cancel the permit of the defendant to do business, other than interstate, in Texas.

The jury returned a verdict against the defendant, and as-

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sessed penalties, under the act of 1899, from May 31, 1900, to March 3, 1903, 1,033 days. Such penalties were assessed at the rate of $1,500 a day during that period, being the total sum of $1,549,500. The jury also found against the defendant under the act of 1903, and assessed the penalties for each day between April 1, 1903, and April 29, 1907, 1,480 days at the rate of $50 per day, making a total of $74,000. The jury further found that the permit of the defendant to do business in the State of Texas should be cancelled. Thereupon the court rendered a judgment for the State of Texas for the sum of the penalties assessed, $1,623,500, and ordered a cancellation of the defendant's permit to do business in the State except as to its interstate commerce business. This judgment was affirmed upon appeal to the Court of Civil Appeals of Texas (106 S. W. Rep. 918), and upon application to the Supreme Court of Texas that court refused to grant a writ of error, and the case was brought here.

The case was submitted upon oral arguments and elaborate briefs and a voluminous record. It was argued, in many aspects, as though this were a proceeding in error to review the weight of the evidence adduced in the state courts, to reëxamine the rulings of the court upon the admissibility of testimony, and to determine the effect of the statute of limitations in the State.

The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quimby* v. *Boyd*, 128 U. S. 488; *Egan* v. *Hart*, 165 U. S. 188; *Dower* v. *Richards*, 151 U. S. 658; *Thayer* v. *Spratt*, 189

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U. S. 346. We shall not, therefore, undertake to follow counsel in the consideration of all the questions argued, but shall limit our review to questions of a Federal nature which we deem to be properly made in this record and essential to the decision of the case.

Epitomizing the Texas anti-trust statutes for the purposes of his charge the learned judge who presided in the District Court, speaking first of the act of 1899, stated them as follows:

"For the purposes of this charge you are instructed that this act made it unlawful for any corporation transacting or conducting any kind of business in this State to enter into, or become a party to, any agreement or understanding with any other corporation or individual to fix or regulate the price in Texas of any article of manufacture or merchandise or to control or limit in Texas the trade in any article of manufacture or merchandise.

"You are further instructed that said statute also made it unlawful for any corporation transacting or conducting any kind of business in this State to bring about or permit any union or combination of its capital, property, trade or acts with the capital, property, trade or acts of any other person or corporation, whereby the price in Texas of any article of manufacture or merchandise would be fixed or sought to be fixed, regulated or sought to be regulated; or whereby the price in Texas of any article of manufacture or merchandise would be reasonably calculated to be fixed or regulated, or whereby the trade in such article of manufacture or merchandise in Texas would be sought to be controlled or limited, or would be reasonably calculated to be controlled or limited.

"The statute known as the anti-trust law of 1903 became effective on March 31st, 1903, and has since continued in force. For the purposes of this charge you are instructed that this statute defines a trust to be a combination of capital, skill or acts, by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes, viz:

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"1. To create or which may tend to create or carry out restrictions in trade or commerce in Texas, or to create or carry out restrictions in the free pursuit in Texas of any business authorized or permitted by the laws of this State.

"2. To fix, maintain or increase the price of merchandise in Texas.

"3. To prevent or lessen competition in Texas in the sale of merchandise.

"4. To abstain from engaging in business or in the sale of merchandise in Texas, or any portion thereof.

"Said statute of 1903 further defines a monopoly to be a combination or consolidation of two or more corporations when effected in any of the following methods, viz:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust, as above defined.

"2. When any corporation acquires the shares or certificates of stock, franchise or other rights, or the physical properties or any part thereof of any other corporation for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

"3. Oil, all other products of petroleum, and goods, wares or merchandise of any character which the defendant or its agents, may have purchased or acquired in any manner outside of the State of Texas and caused to be transported to its agents or others within the State, are the subjects of interstate commerce when they enter this State, and so remain until such commodities are removed from the original tanks, vessels or other packages in which they are imported into the State and become mixed with the common mass of property of similar character in this State. The anti-trust laws of Texas have no reference to agreements or pools or arrangements of any character concerning subjects of interstate commerce, and no agreement,

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pool or other arrangement, if any, which the defendant may have entered into with reference to the sale of any subject of interstate commerce can be considered by you as violating any anti-trust law of Texas. But neither oil purchased by the defendant from the Corsicana Refinery or elsewhere in Texas, nor other merchandise purchased by defendant at points in Texas, nor such oil or other merchandise purchased by defendant at points outside of the State and transported into the State and removed from the original packages or vessels in which it was brought into the State and mingled with other property of similar character in the State, is the subject of interstate commerce, but on the contrary is the subject of local commerce, and any agreement or pool or arrangement entered into by defendant with reference to such property or the sale thereof, if any such sale there were, would be unlawful, if in violation of the anti-trust laws of this State."

The penalties denounced by the act of 1899 were not less than $200 nor more than $5,000 for each day the defendant might be found to have violated the law; under the act of 1903 the penalty was fixed at $50 for each day, and a forfeiture of the right to do business within the State of Texas was declared.

The complaint in the case is voluminous, and its averments contain the history of the so-called conspiracy between the Waters-Pierce Oil Company and a number of persons composing the Standard Oil Company, beginning in January, 1870, for the purpose of monopolizing and controlling the business of refining and transporting and selling petroleum and similar products throughout the United States and in the State of Texas. It charges that the Waters-Pierce Oil Company, incorporated in 1878, and the predecessor of the defendant company, was a party to that conspiracy, and for the purpose of carrying out the same had entered into contracts with corporations and individuals engaged in the business of selling petroleum and similar products within the State and suppressed competition therein. It charges that the Waters-Pierce Oil Company had entered into an agreement with the Standard Oil Company of New Jer-

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sey for the purpose of monopolizing the trade in petroleum and for the purpose of carrying out certain contracts and conspiracies, entered into for the purposes aforesaid, and permitted the Standard Oil Company to acquire a majority of the shares of stock of the Waters-Pierce Company.

The original Waters-Pierce Oil Company, it states, had been dissolved, and the new company, the present defendant, organized on May 29, 1900, had assumed all the contracts and agreements of its predecessor, and it was averred that the dissolving of the old Waters-Pierce Company and the forming of the new company, the defendant in this case, was in further pursuance of the conspiracy for the purpose of continuing the monopoly and control which had been acquired by the old company, and for the purpose of rendering ineffective the judgments of the state court and of this court (*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28), wherein the right of the Waters-Pierce Company to do business in Texas was forfeited.

It was further averred that the new corporation was of the same name as the old one, with the same amount of stock, which was distributed to the holders of stock in the new corporation in the same proportion among the shareholders as it was in the old corporation. It is charged that a major part of the capital stock, although in fact owned by the Standard Oil Company of New Jersey, stood for a time in the name of H. C. Pierce, but was in fact owned by the Standard Oil Company. That the conduct of the business in the new corporation was not changed, and that it was controlled by the Standard Oil Company of New Jersey in the same manner as the old company had been; that the old contract, whereby there was a division of territory and the limitation of the operations of the Waters-Pierce Oil Company to the State of Texas and some other territory, was maintained and enforced. That other concerns had been acquired in the carrying out of the scheme charged; that said companies had been put out of business or were used in controlling and monopolizing the trade and business aforesaid; that the defendant, the new corporation, was a party to these arrange-

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ments, participated in them, and was engaged in carrying them out.

The things charged were alleged to have the effect to control the defendant and a large number of other companies by the same corporation and persons, with the acquiescence and consent of the defendant; that all competition in Texas between companies was destroyed; that certain sections and parts of the United States were assigned to the various companies; that the defendant was permitted to do business in Texas, and that with its knowledge and consent, upon its instance and demands, all other companies had been excluded from doing business in the State of Texas; that by the agreement the defendant was obliged to secure all the oil sold by certain named refiners at prices determined by the Standard Oil Company and those interested in it, with the effect of monopolizing and controlling the business in oil and the production of petroleum in Texas by fixing the prices of such products in that State.

The plaintiff summarizes the unlawful results accomplished as follows:

"(1) The plaintiff in error is dominated and controlled by and its business dictated by the Standard Oil Company of New Jersey.

"(2) A large number of individuals and corporations doing business in the sale of petroleum products are excluded from doing business in the State, and competition is lessened.

"(3) The price of oil had been maintained at an exorbitant figure, being from ten to twenty-five per cent higher than that of oil sold in the territory not claimed by plaintiff in error.

"(4) Competition had been suppressed and business destroyed in the State by unconscionable and unfair means.

"(5) A substantially complete monopoly in petroleum products had been established, the plaintiff in error having sold, during the period of ten years past, at least ninety-five per cent of all petroleum products sold."

The defendant answered and filed a large number of special pleas and exceptions, taking issue upon the charges made in the

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petition, and alleging the unconstitutionality of the acts of 1899 and 1903, and alleging that if the petition of the State of Texas be granted it would be denied the equal protection of the laws, be subjected to *ex post facto* laws, deprived of its property without due process of law, and have the obligations of its contracts impaired, contrary to the provisions of the Constitution of the United States.

At the trial at the May term of the District Court of Travis County a verdict was rendered in favor of the State, and penalties were assessed, and the judgment rendered as herein before stated. In the Court of Civil Appeals of the State of Texas that court found the facts to be as found by the verdict in the trial court, and in concluding its opinion upon the question of fact said:

"In appellant's motion for a new trial in the court below, and in its presentation of the case here, the verdict of the jury has been challenged, the contention being that the testimony fails to show that appellant has violated any of the anti-trust laws of this State. The evidence is very voluminous, and it is not necessary that it be set out or epitomized in this opinion. It is sufficient, we think, to show that from the date of its permit to do business in this State, May 31, 1900, appellant has been a party to an agreement or understanding with the Standard Oil Company of New Jersey, one object of which was to create a monopoly and control the price of petroleum oil and prevent competition in its sale in a large and specified territory, including the State of Texas; and that, to a large extent, such object has been accomplished. In so far as that agreement related to this State, appellant, acting by its agents, performed it within the State; and such performance within the limits of the State constitutes violations of Texas laws and renders appellant amenable to such laws, although the agreement between it and the Standard Oil Company may not have been made in this State. To a large extent the case rests upon circumstantial evidence; but we cannot say that the jury were not warranted in the conclusions drawn from it. Hence we hold that the verdict is sup-

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ported by testimony, and no error was committed in overruling the motion for a new trial."

The court left the case to the jury upon a charge which permitted them to find whether the defendant company, acting through its duly authorized agents, had entered into or had become a party to an agreement or understanding with the Standard Oil Company of New Jersey on June 1, 1900, to fix or regulate the price of oil in Texas, and whether the company remained or continued to be a party to such agreement, and carried out the same in Texas on dates subsequent to June 1, 1900, and prior to March 31, 1903, and whether the oil, in reference to which such agreement was made and carried out was the subject of local as distinguished from interstate commerce.

And the court further charged that if within the time above stated the defendant had brought about or permitted any combination or union of its capital with that of the Standard Oil Company of New Jersey whereby the price of such oil in Texas was found to be controlled or limited, fixed or regulated, or whereby such price would be reasonably calculated to be fixed or regulated, or whereby the trade in such oil in Texas was sought to be controlled or limited, they might return a verdict for the State.

And the court charged that if they should find that the defendant, through its duly authorized agents, had entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating in Texas, or which tended to create in Texas, or carry out in Texas, restrictions in the free pursuit of selling oil, or having the effect of increasing the price of such oil in Texas, or to prevent or lessen competition in selling the same in said State; and that the defendant remained or was a party to and acted under such combination, if such there was on March 31, 1903, and thereafter prior to April 29, 1907, they might return a verdict of guilty.

The jury was further instructed that if they found from the evidence that the direction of the affairs of the Standard Oil Company of New Jersey and those of the defendant company

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were under the same management or control after March 31, 1900, and prior to April 29, 1907, and that they were placed under such common management or control by their respectively authorized officers, and if such management or control created or tended to create, or to carry out restrictions in the sale of oil in Texas, as above stated, or to fix, maintain or increase the prices of such oil in said State, or to prevent or lessen competition in the sale of such oil, they might return a verdict for the State. The jury found each of the issues submitted against the defendant. The Court of Civil Appeals affirmed this finding of fact and we must accept the same as established for the purposes of this proceeding in error.

Numerous exceptions were taken to the charge at the trial and are the subjects of assignments of error in the state court and in this court. We are concerned with such as relate to the Federal questions involved in this proceeding.

In the eleventh paragraph of the charge the court instructed the jury as follows:

"XI. If you find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 31, 1903, or on any date subsequent thereto and prior to April 29th, 1907, acquired a majority of the capital stock of the defendant corporation and thereby effected a combination of said two corporations, and if you further find from preponderance of the evidence that said stock was acquired and combination effected, if any, with the purpose and intention on the part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of the character and kind of oil above mentioned, or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will return a verdict for the State, and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph eleven of the court's charge. In this connection you are instructed that if the defendant entered into a monopoly of the character mentioned in this paragraph

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of the charge, each day between March 30, 1903, and April 29th, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas."

The judges of the Court of Civil Appeals differed in their views as to the correctness of this charge, the learned justice who wrote the opinion holding the view that it was calculated to mislead the jury to the belief that they might convict upon this issue regardless of whether the defendant had any knowledge of, participated in or aided the Standard Oil Company in acquiring the stock of the defendant for the purposes stated.

But the court agreed that if wrong this part of the charge afforded no ground for reversal, because the jury found that the appellant had violated other provisions of the act, and assessed but one penalty for each day's violation, and therefore the judgment would have been the same, and the error, if any, was harmless.

In thus deciding the Court of Civil Appeals did not determine a Federal question, nor necessarily decide one adversely to the plaintiff in error, controlling in character, if it appears upon this record that the verdict and judgment can stand upon other grounds free from objection, so far as Federal rights are concerned.

Much of the argument for plaintiff in error is predicated upon the contention that the acquiring of the stock of the Waters-Pierce Company by the Standard Oil Company and the making of the agreement charged were not shown to have been acts done in Texas. It is contended that such acquiring of stock, and agreement, if any, were acts beyond the jurisdiction of the State. But an inspection of the record discloses that the court charged that no agreement made by the defendant outside of the State of Texas could be made the basis of forfeiting its permit to do business in the State, unless such agreement was executed, or attempted to be executed, in the State by the duly authorized agents of the defendant. And in the findings which we have above quoted as to the evidence the state court has

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found that the defendant has been since May 31, 1900, a party to an agreement with the Standard Oil Company of New Jersey to create a monopoly and to control prices and prevent competition in Texas, and that to a large extent the object has been accomplished. These findings of facts are conclusive upon us, and show that the conviction was had, for acts and transactions committed and carried out within the State of Texas.

The argument to the effect that the rulings of the court as to the admission of testimony, and upon questions of general law deprived the defendant of its property and rights without due process of law requires us to notice the limitations upon the authority of this court when dealing with legislative acts and proceedings to enforce the same in the state courts. That state legislatures have the right to deal with the subject-matter and to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Smiley* v. *Kansas*, 196 U. S. 447. Having the power to pass laws of this character, of course the State may provide for proceedings to enforce the same. The State, keeping within constitutional limitations, may provide its own method of procedure and determine the methods and means by which such laws may be made effectual. "The limit of the full control which the State has in a proceeding of its courts, both in civil and criminal cases, is subject only to the qualifications that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." *West* v. *Louisiana*, 194 U. S. 258, 263; and see *Davis* v. *Texas*, 139 U. S. 651; *Brown* v. *New Jersey*, 175 U. S. 172, 175; *Allen* v. *Georgia*, 166 U. S. 138, 140; *In re Converse*, 137 U. S. 624, 632, and *Twining* v. *New Jersey*, 211 U. S. 78, decided at this term of court, where the subject is fully discussed, and previous cases in this court cited.

It is contended that the acts in this case were given a retroactive effect in violation of the Federal Constitution. Art. I, § 10. This argument is predicated largely upon the contention

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that the conviction in this case was because of the old agreement of the former Waters-Pierce Oil Company, made long before the passage of the present statute, at a time when it was legal, and before the creation of the defendant company. But in view of the facts found in the state court, to which we have already referred, there was ground for conviction, not because of the making of the old agreement for the division of the territory and the suppression of competition while the old company was in existence, but because the new company was found to have carried out the old agreement and made itself a party thereto, and by continuing the old arrangement after the passage of the law, had brought itself within its terms. Of a similar contention this court said in *Trans-Missouri Traffic Association Case*, 166 U. S. 290:

"It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect. That the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it had been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act."

It is further insisted that the acts in question are so vague, indefinite and uncertain as to deprive them of their constitutionality, in that they punish by forfeiture of the right to do business, and the imposition of penalties, under provisions of an act which do not advise a citizen or corporation, prosecuted under them, of the nature and character of the acts constituting

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a violation of the law. These objections are found in the words of the act of 1899, denouncing contracts and arrangements "reasonably calculated" to fix and regulate the price of commodities, etc. And in the act of 1903 acts are prohibited which "tend" to accomplish the prohibited results. It is insisted that these laws are so indefinite that no one can tell what acts are embraced within their provisions. In support of this contention it is argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do, and what it is their duty to avoid. And reference is made to decisions which have held that a criminal statute should be so definite as to enable those included in its terms to know in advance whether the act is criminal or not. Among others, *Tozer* v. *United States*, 52 Fed. Rep. 917, is cited, in which the opinion was by Mr. Justice Brewer, then judge of the Circuit Court, in which it was held that the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. To the same effect is *Railway Co.* v. *Dey*, 35 Fed. Rep. 866, also decided by Judge Brewer at circuit. And also the case of *Louisville & Nashville Railway* v. *Commonwealth*, 99 Kentucky, 132, is relied upon, in which a railroad was indicted for charging more than a just and reasonable rate, in which it was held that the law was unconstitutional, for under such an act it rests with the jury to say whether a rate is reasonable, and makes guilt depend, not upon standards fixed by law, but upon what a jury might think as to the reasonableness of the rate in controversy. But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited.

Take the act of 1903, which denounces acts which "tend" to bring about the prohibited results. It is not uncommon in criminal law to punish not only a completed act, but also acts which attempt to bring about the prohibited result. In *United States* v. *Knight*, 156 U. S. 1, this court said: "Again, all the au-

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thorities agree that in order to vitiate a contract or combination it is not essential that its result be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from a free competition." This language was quoted with approval in the *Addyston Pipe Co. Case*, 175 U. S. 237. And in the *Northern Securities Case*, 193 U. S. 197, while the Sherman Act directly condemned conspiracies and combinations in restraint of trade or monopolizing or attempting to monopolize the same, this court said (page 332):

"That to vitiate a combination, such as the act of Congress condemns it need not be shown that the combination in fact results, or will result, in a total suppression of trade, or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition."

As to the phrase, "reasonably calculated," what does it include less than acts which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished? Again, speaking of the Sherman Act, this court said in *Swift & Co.* v. *United States*, 196 U. S. 375:

"The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent, for instance, the monopoly, but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exists, this statute, like many others, and like the common law

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in some cases, directs itself against that dangerous probability as well as against the completed result."

It is true that the decisions quoted are in civil cases involving contracts and arrangements held invalid when attacked in proceedings in equity, and did not involve penalties such as were imposed in the case now under consideration.

And it is to be remembered that we are dealing with an act of the legislature, sustained in courts of the State, with reference to its validity in view of the prohibitions of the Federal Constitution against deprivation by state action of liberty or property without due process of law. In this case the defendant has had a trial in a court of justice duly established under the laws of the State, the question of its liability has been submitted to a jury. The judgment has been reviewed in an appellate court, and the correctness of the findings of fact and rulings of law in the lower court affirmed. We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden.

Again, it is contended that the fines imposed are so excessive as to constitute a taking of the defendant's property without due process of law. It is not contended in this connection that the prohibition of the Eighth Amendment to the Federal Constitution against excessive fines operates to control the legislation of the States. The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the State. We can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law. *Coffey* v. *Harlan County*, 204 U. S. 659.

The business carried on by the defendant corporation in Texas was very extensive and highly profitable, as the record discloses. The property of the defendant amounted to more

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than forty millions of dollars, as testified by its president. Its dividends had been as high as seven hundred per cent per annum. It was the theory of the State, sustained by the verdict and judgment, that the former course of business was continued, notwithstanding the judgment of ouster in the former case. Within the bounds of the statute the penalties were left to the discretion of the jury trying the case. While the penalties imposed are large they are within the terms of the statute. Under the act of 1899 the jury imposed a penalty at the rate of $1,500 a day; under the act of 1903 at the rate of $50 per day. Assuming for this purpose that the defendant was guilty of a violation of the laws over a period of years, and in transacting business upon so large a scale, as shown in this case, we are not prepared to say, after confirmation of the verdict and judgment in courts of the State, that there was want of due process of law in the penalties assessed.

Remembering, as we have had frequent occasion to say, that our province in this case is limited to an examination of objections arising under the Federal Constitution, we are unable to find in this record any ground for reversing the judgment of the state court.

Affirmed.

WATERS-PIERCE OIL COMPANY *v.* STATE OF TEXAS (NO. 2).

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 360. Argued November 2, 3, 1908.—Decided January 18, 1909.

The review of a judgment of a state court is confined to assignments of error made and passed upon in the judgment brought here for review; assignments of errors in this court cannot bring new matter into the record.

When a state court decides a case upon a non-Federal ground which is

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sufficient to maintain the decision this court will not review the judgment.

Procedure in matters under its jurisdiction is for the State and its courts to determine; and nothing in the Federal Constitution prevents a state court from acting in a proceeding for receivership of a corporation brought by the State on testimony taken in the suit by the State against the same corporation and on the judgment in which suit the receivership proceeding is based.

An attempt to raise the Federal question in the petition for rehearing in the highest court of the State will not avail if the petition is overruled without specifically passing on the questions.

Writ of error to review 105 S. W. Rep. 851, dismissed.

THE facts are stated in the opinion.

Mr. Moorfield Storey, *Mr. E. B. Perkins* and *Mr. Henry Samuel Priest*, with whom *Mr. J. L. Thorndike* was on the brief, for plaintiff in error.

Mr. R. V. Davidson, Attorney General of the State of Texas, *Mr. R. L. Batts* and *Mr. G. W. Allen*, with whom *Mr. Jewel P. Lightfoot*, *Mr. John W. Brady* and *Mr. T. W. Gregory* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case was argued and submitted with Waters-Pierce Oil Company, plaintiff in error, against the State of Texas, just decided, No. 359, *ante*, p. 86. It is brought here to review the action of the Court of Civil Appeals of Texas affirming an order of the District Court of Travis County appointing a receiver to take charge of the property and business of the Waters-Pierce Oil Company. In view of the statement made in No. 359 it is unnecessary to repeat the facts leading up to the judgment in this case. On the same day that the judgment was rendered in the former case the State of Texas, acting through its Attorney General and the county attorney of Travis County, filed in the District Court of Travis County an application for the appoint-

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ment of a receiver, reciting the judgment rendered in the earlier case, averring that a suit was pending in Missouri for the forfeiture of the charter of the Waters-Pierce Oil Company; that a master had been appointed in that case by the Supreme Court of the State wherein the action was pending; that he had reported in favor of dissolving the corporation, which recommendation had the force and effect of a judgment forfeiting the charter of said company, and it was alleged that the penalties recovered in that case could not be collected outside of the State of Texas; that the property of the defendant within the State of Texas was inadequate to pay the judgment; that the great bulk of the property situated in the State subject to the payment of the judgment consisted of accounts, cars, money on hand and other property, easily movable, and that if the same was carried beyond the limits of the State the judgment could not be collected. It was averred that under and by virtue of an act of the State of Texas, passed April 11, 1907, the State has a lien upon all said property to secure the payment of the above-mentioned judgment.

A receiver was asked for to take charge of the property and assets of every kind belonging to the defendant and situated in the State of Texas. And the State also asked for a writ of injunction, prohibiting the removal from the State of Texas of any of the property of the defendant. On the same day the court granted the temporary injunction as prayed for, and set the application for a receiver for hearing on June 8, 1907.

On the seventh of June the defendant's motion for a new trial in the principal case having been overruled, the defendant gave notice of appeal to the Court of Civil Appeals of Texas, and tendered a supersedeas bond in the sum of $3,275,000, which bond was not accepted. On June 10, 1907, the court reached the conclusion that a receiver should be appointed, and continued the temporary injunction in force, from which action the defendant gave notice of its intention to appeal to the Civil Court of Appeals. At the time of the making of this order the judge of the court announced his determination to appoint

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Robert J. Eckhardt receiver, and postponed the hearing until June 13, 1907, to hear objections to the appointment, and on that date the court made its order appointing Eckhardt receiver, fixing the bond in the sum of $250,000. On June 19, 1907, Eckhardt filed his bond, which was approved and he qualified as receiver, and after the appointment of a receiver and the approval of his bond as aforesaid a supersedeas bond in the sum of $100,000, for appeal from the order appointing a receiver, was approved. On June 15, 1907, the motion for new trial being overruled in the main case, the Waters-Pierce Oil Company appealed, and gave a bond, which was approved by the clerk.

On the appeal of the present case, involving the receivership, to the Civil Court of Appeals of Texas an application was made for an injunction restraining a receiver, who had been appointed by the Circuit Court of the United States for the Eastern District of Texas, upon which application the court declined to make any order interfering with the Federal receiver, but ordered its receiver to appear in conjunction with the attorneys of the State of Texas in the Circuit Court of the United States, and there urge and insist upon the rights of the state courts to prior jurisdiction. 103 S. W. Rep. 836.

The right to the Federal receivership is involved in No. 224 of this term, heretofore argued and submitted to this court.[1]

On October 23, 1907, the appeal of the Waters-Pierce Oil Company from the order appointing a receiver came on for hearing in the Court of Civil Appeals. The judgment of the District Court was affirmed. 105 S. W. Rep. 851. Subsequently the Supreme Court of Texas refused a writ of error to that judgment. The present proceeding in this court seeks a reversal of the judgment of the Court of Civil Appeals of Texas affirming the order in the District Court appointing the receiver.

It is well settled in this court that a review of the judgment of a state court is confined to the assignments of error made and passed upon in the judgment of the state court brought here for review. The assignment of errors in this court cannot bring into

[1] See *post*, p. 118.

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the record any new matter for our consideration. *Harding* v. *Illinois*, 196 U. S. 78.

Looking to the assignments of error in the Court of Civil Appeals, we find that the first one to mention the Federal Constitution is No. IX, in which the constitutionality of the act of the State of Texas approved April 11, 1907, is challenged, and that act is alleged to be void because in violation of § 10 of Article II of the Constitution of the United States, which denies to any State the right to pass *ex post facto* laws.

The tenth assignment assails the same act, because in violation of § 1 of the Fourteenth Amendment of the Federal Constitution. Assignment 12 is likewise based upon objections to the act of April 11, 1907. The amended assignments of error contain additional assignments, numbers 15 and 16, which likewise, are also leveled at the act of April 11, 1907.

The act of April 11, 1907, undertakes in § 1 thereof to give a lien upon the property of any corporation within the State, or on any corporation created by the laws of the State, or any foreign corporation authorized to do business within the State, which shall violate the anti-trust laws of the State, for fines and penalties, with costs of suit recovered in such cases, and gives the like lien for the recovery of such fines and penalties where any such law had been theretofore violated, or should be violated before the taking effect of the act, and provides for the appointment of a receiver in such cases.

When we examine the opinion of the Court of Civil Appeals we find that it sustained the proceeding for the appointment of a receiver, not only under the act of April 11, 1907, but as well by virtue of subdivision 3 of article 1465 of Sayles' Civil Statutes for Texas, passed originally in 1887, which subdivision provides that a receiver may be appointed where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

It is well settled in this court that where a state court decides a case upon an independent ground not within the Federal objections taken, and that ground is sufficient to maintain the

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judgment, this court will not review the case. *Leathe* v. *Thomas*, 207 U. S. 93; *Eustis* v. *Bolles*, 150 U. S. 361; *Giles* v. *Teasley*, 193 U. S. 146.

The only other assignments of error in the receivership proceedings which mention the Federal Constitution are numbers 13 and 14, which are as follows:

"XIII. The court erred in appointing the said receiver without any evidence being introduced before it at the time said appointment was made to show that defendant did not intend to change its status and methods of doing business so as to conform to the laws of the State of Texas, and without evidence affirmatively showing that defendant could not make use of its property and carry on its business in accordance with law, and in holding that the court was authorized to so appoint a receiver for defendant's property in the State of Texas and deprive defendant of the instrumentalities by which it had been convicted of violating the laws of said State, based upon its past conduct and the said judgment of conviction rendered against it on June 1, 1907.

"Wherefore, defendant says that the said action of the court was unauthorized and in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States, and has the effect of depriving defendant of its property without due process of law and in denying to it the equal protection of the laws.

"XIV. The court erred in disregarding the supersedeas bond filed by the defendant in connection with its appeal from the main judgment recovered against it on June 1, 1907, and in requiring defendant to file the additional bond in the sum of one hundred thousand dollars to supersede the order appointing the said receiver and to avoid having to surrender its property to said receiver by reason of said appointment, and this action on the part of the court was without lawful warrant and in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States, in that the effect of such action by the court was to deprive the defendant of its property without due

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process of law and to deny to it the equal protection of the law."

We are of opinion that neither of these assignments presents substantial questions of a Federal character. The practice of the state courts in acting upon matters within their jurisdiction is left for the States and their courts administering their laws to determine, and if the court saw fit to act upon the testimony already heard and the conviction already had of the violation of the anti-trust laws of the State, there is nothing in the Federal Constitution which prevents it from so doing. Nor does the time or manner in which the state court saw fit to approve the receiver's bond present any question under the Fourteenth Amendment. See the cases cited in *Waters-Pierce Oil Co.* v. *Texas*, No. 359, *ante*, p. 86. The attempt to assign new errors in the petition for rehearing, which was overruled without an opinion passing on Federal questions, cannot avail. See *McCorquodale* v. *Texas*, 211 U. S. 432, decided at this term of this court, and previous cases therein cited. We are therefore of the opinion that no substantial Federal question is presented in this case, and the writ of error must be dismissed.

The writ of error is dismissed.

PALMER *v.* STATE OF TEXAS AND ECKHARDT, RECEIVER OF THE WATERS-PIERCE OIL COMPANY.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 224. Argued April 8, 9, 1908.—Decided January 18, 1909.

As the Federal and the state court exercise jurisdiction within the same territory, derived from and controlled by separate authority, each must respect the jurisdiction acquired over property by the other.

When either a Federal, or a state, court of competent jurisdiction takes possession of, or acquires jurisdiction over, property, that property is

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as effectually withdrawn from the jurisdiction of the other court as though removed to the territory of another sovereignty. *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54.

Jurisdiction over property, properly acquired by the state court on the qualification of the receiver, is not lost by the giving of a *supersedeas* pending appeal which, as in this case, merely suspends the order of appointment.

When a state court has acquired jurisdiction over property before any application is made to the Federal court it has the right while lawfully exercising that jurisdiction to determine how far it will permit any other court to interfere therewith. *People's Bank* v. *Calhoun*, 102 U. S. 256.

Jurisdiction over property by a state court so as to withdraw it from the jurisdiction of Federal courts in the same territory, does not necessarily depend on possession, but is acquired as soon as the receiver has been appointed and has qualified. *Farmer's Loan & Trust Co.* v. *Lake St. Electric Railway Co.*, 177 U. S. 59, followed; *Shields* v. *Coleman*, 157 U. S. 168, distinguished.

The courts of a State construe its statutes and their judgment is conclusive in the Federal courts.

Where the state courts have sustained a receivership of a foreign corporation on a statute in force before the corporation entered the State, and such statute provides for the appointment of a receiver in case of dissolution, forfeiture, insolvency or imminent danger thereof, the fact that the receivership was also sustained under provisions of an anti-trust law passed after the corporation entered the State, does not amount to an unlawful interference of the rights of such corporation to transact interstate commerce business.

Under the circumstances of this case it is not proper to charge the costs and expenses of the receiver erroneously appointed by the Federal court on complainant, but those expenses should be paid from the fund.

158 Fed. Rep. 705, modified and affirmed.

THE facts are stated in the opinion.

Mr. Moorfield Storey and *Mr. E. B. Perkins*, with whom *Mr. J. L. Thorndike* was on the brief, for petitioners:

The receiver appointed by the state court was not in possession, and had no right to possession, of the property at the time when the order was made by the United States court for the appointment of a receiver. *Shields* v. *Coleman*, 157 U. S. 169;

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People's Cemetery Association v. *Oakland Cemetery Co.*, 24 Tex. Civ. App. 668; *S. C.*, 60 S. W. Rep. 679; *Hagan* v. *Lucas*, 10 Pet. 400, discussed and distinguished.

Neither the State of Texas nor Eckhardt is a party to this cause or interested in its objects. The suit is a shareholders' suit for the purpose of winding up the business of the company in Texas, which cannot be carried on there under the existing laws, and for the protection of its property and business in the meanwhile by the appointment of a receiver. The receiver was appointed by the United States Circuit Court for that purpose, without interfering with the possession of any other person except that of the defendant in the suit, The Waters-Pierce Oil Company. There is nothing in these proceedings that affected any right or interest either of the State of Texas or of Eckhardt, the receiver previously appointed by the state court.

Possession of the officer of one court, whether he be a receiver, sheriff, marshal, or sequestrator, is the ground upon which the authority of other courts or any of their officers to meddle with possession of the same property has been excluded. There is no magic about a receiver, and the same rule is applied to him as to a sheriff or a marshal, and for the same reasons. *Hagan* v. *Lucas* (1836), 10 Pet. 400; *Taylor* v. *Carryl* (1857), 20 How. 583; *Freeman* v. *Howe* (1860), 24 How. 450; *Covell* v. *Heyman* (1883), 111 U. S. 176; *Shields* v. *Coleman* (1895), 157 U. S. 168; *Payne* v. *Drewe* (1804), 4 East, 523, 545.

In applying the rule the same kind of possession is necessary in the case of a receiver as in the case of a sheriff or a marshal.

The Court of Appeals was also wrong in directing that the costs of the receivership be taxed against the complainant.

That was a question between the parties to the suit, and was not involved in the appeal of the State of Texas and Eckhardt from the orders refusing their application, and the materials necessary for determining how the costs of the receivership should be borne were not before the court. Those costs were not part of the costs of the appeal.

By the effect of the supersedeas, the property and business

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of the company remained in its hands in the same manner as if there had been no judgment or order of the state court. The expenses of the receivership were a part of the expenses of carrying on the business, and should be dealt with accordingly. If the State should ever be in a position to call for an account of the business of the company during the pendency of the appeal in the state courts, the question how the expenses of the receivership should be borne may arise. But it does not arise upon the appeal in this case, and the expenses ought not to be saddled on the plaintiff without an inquiry.

This part of the decree is also contrary to *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, and in the present case there are not even the circumstances which furnished the ground of the contention that there should have been a different decision in that case.

Mr. R. V. Davidson, Attorney General of the State of Texas, and *Mr. G. W. Allen*, with whom *Mr. Jewel P. Lightfoot*, *Mr. John W. Brady*, *Mr. T. W. Gregory*, *Mr. R. L. Batts*, *Mr. D. W. Doom* and *Mr. D. H. Doom* were on the brief, for respondents:

The state court acquired jurisdiction over the property in question before the complaint was filed in the Federal court. Opinion below; *Farmers' L. & T. Co.* v. *Lake Street E. R. Co.*, 177 U. S. 51; *Chittenden* v. *Brewster*, 2 Wall. 191; *Gaylord* v. *Railway Co.*, 6 Biss. 286, 291, 292; *Union Trust Co.* v. *Railway Co.*, 6 Biss. 198; *Illinois Steel Co.* v. *Putnam*, 68 Fed. Rep. 515; *Adams* v. *Trust Co.*, 66 Fed. Rep. 617; *Sharon* v. *Terry*, 36 Fed. Rep. 355; *Reisner* v. *Railway Co.*, 89 Texas, 656; *Lewis* v. *Railway Co.*, 81 Texas, 1; *May* v. *Printup*, 59 Georgia, 128; *Waters-Pierce Oil Co.* v. *State of Texas*, 103 S. W. Rep. 836.

The jurisdiction of the state courts having attached, it became exclusive, and their right to prosecute the suit to final determination and exhaust their jurisdiction could not be arrested, defeated, impaired or interfered with by a Federal tribunal. See opinion below; *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38; *Covell* v. *Heyman*, 111 U. S. 176; *Hagan* v.

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Lucas, 10 Pet. 400; *Taylor* v. *Taintor*, 16 Wall. 370; *Heidritter* v. *Oil Cloth Co.*, 112 U. S. 148, 294; *People's Bank* v. *Winslow*, 102 U. S. 256; *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Farmers' L. & T. Co.* v. *Railway Co.*, 177 U. S. 61; *Sharon* v. *Terry*, 36 Fed. Rep. 355, and authorities cited; *Mutual Reserve Fund* v. *Phelps*, 190 U. S. 147; *Reisner* v. *G., C. & S. F. Ry. Co.*, 89 Texas, 658, 660; *Union Trust Co.* v. *Railway Co.*, 6 Biss. 197; *Waters-Pierce Oil Co.* v. *Texas*, 103 S. W. Rep. 836; Waite on Insolvent Corp., § 261; High on Receivers, § 52; *State* v. *Reynolds*, 107 S. W. Rep. 487.

The giving of the supersedeas bond appealing from the order of the state court appointing its receiver still left the property in the custody of the state courts, though the right of the receiver to the possession thereof was suspended and the right of the oil company to such possession was for the time being restored. Rev. Stat. of Texas, art. 1383; *Waters-Pierce Oil Co.* v. *Texas*, 103 S. W. Rep. 836; *San Antonio St. Ry. Co.* v. *Texas*, 38 S. W. Rep. 54; *Hagan* v. *Lucas*, 10 Pet. 400; *G., C. & S. F. Ry. Co.* v. *F. W. & N. O. Ry. Co.*, 68 Texas, 103; *Churchill* v. *Martin*, 65 Texas, 368; *Wells* v. *Littlefield*, 62 Texas, 30; *S. C.*, 12 Ab. Prac. 66; *Fowler* v. *Stonum*, 6 Texas, 72; *O'Brien* v. *Hilburn*, 22 Texas, 622, 626; *Fleming* v. *Clark*, 26 Mo. App. 222; *Caldwell* v. *Gans*, 1 Montana, 577, 578; *Coss* v. *Wieder*, 22 Oregon, 457; *Selleck* v. *Phelps*, 11 Wisconsin, 388; *Pipher* v. *Fordyce*, 88 Indiana, 437; *Bain* v. *Lyle*, 67 Pa. St. 64, 66; *Slutter* v. *Kirkendall*, 100 Pa. St. 313.

The decision of the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas, holding that the giving of the supersedeas bond appealing from the order of the state court appointing its receiver left the property in the custody of the state court, is binding on the Federal court. Rev. Stat., § 721; *Waters-Pierce Oil Co.* v. *Texas*, 103 S. W. Rep. 836; *Wade* v. *Travis Co.*, 174 U. S. 499; *United States* v. *Morrison*, 4 Pet. 124; *Green* v. *Neal's Lessee*, 6 Pet. 291; *Leffingwell* v. *Warren*, 2 Black, 599; *Fairfield* v. *Gallatin Co.*, 100 U. S.

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47; *Andrews* v. *Nat. F. & P. Works*, 36 L. R. A. 150; *Sanford* v. *Poe*, 69 Fed. Rep. 546; *Bauserman* v. *Blount*, 147 U. S. 647; *Moores* v. *Citizens' Nat. Bank*, 104 U. S. 625; *Stutsman County* v. *Wallace*, 142 U. S. 293; *Suydam* v. *Williamson*, 24 How. 427; *Waters-Pierce Oil Co.* v. *State*, 106 S. W. Rep. 326.

MR. JUSTICE DAY delivered the opinion of the court.

This case grows out of the proceedings in the State of Texas to forfeit the permit of the Waters-Pierce Oil Company to do business in that State, and the subsequent proceedings for the appointment of a receiver of the property of the company in the state court, just decided, *Waters-Pierce Oil Co.* v. *Texas*, Nos. 1 and 2, cases Nos. 359 and 360, *ante*, pp. 86, 112. It is unnecessary, in view of the recital of the facts contained in those cases, to repeat herein what is there said in this connection.

On the nineteenth day of June, 1907, after the appointment of a receiver in the state case and the acceptance and approval of his bond, an appeal was taken from the District Court of Travis County to the Court of Civil Appeals of Texas, and bond given to supersede the receivership. Immediately thereafter and upon the same day a bill was filed by Bradley W. Palmer, one of the petitioners herein, against the Waters-Pierce Oil Company, in the Circuit Court of the United States for the Eastern District of Texas, praying for the appointment of a receiver for the Waters-Pierce Company. Palmer filed the bill as a stockholder in the company. The bill is quite lengthy and recited the proceedings in the District Court of Travis County, Texas, stated in cases Nos. 359 and 360, *ante*, recites the appeal from the order appointing a receiver, to the Court of Civil Appeals, also the appeal from the judgment terminating the right to do business in Texas, and for the recovery of penalties.

The prayer of the bill is for the appointment of a receiver to take possession of the property belonging to the company in Texas, that the business of the company might be wound up,

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and its property sold, that the receiver be authorized to operate and manage the property, etc.

On the same day the Waters-Pierce Oil Company waived the service of subpœna, confessed the averments of the bill, and the Circuit Court appointed Chester B. Dorchester receiver.

On the same day H. C. Pierce intervened, and, repeating the allegations of the original bill, prayed the same relief. On June 20, 1907, Dorchester qualified and gave bond as receiver, and was put in possession of the property.

The cases involved in Nos. 359 and 360, *ante*, having been appealed to the Court of Civil Appeals, Robert J. Eckhardt, the state receiver appointed in the District Court of Travis County, applied in the Court of Civil Appeals for an order to obtain possession of the property which had been placed in the hands of the Federal receiver.

The Court of Civil Appeals on June 28, 1907, handed down an opinion (103 S. W. Rep. 836), in which it declined to make an order directing the receiver in the Federal court to surrender possession, but did direct its receiver, in conjunction with the law officers of the State of Texas, to appear before the Circuit Court of the United States for the Eastern District of Texas, and to there urge the rights of the State and the prior jurisdiction of its courts over the property in question, and to ask for such orders, decrees and judgments as might be proper and necessary to protect that jurisdiction.

Thereafter, on July 1, 1907, the State of Texas, through its officers and Eckhardt as receiver, applied to the Circuit Court of the United States and prayed it to set aside and annul its order appointing a Federal receiver. On July 15 the Circuit Court refused to grant the prayer of the State of Texas and the state receiver. The State of Texas and Eckhardt as receiver took an appeal from the order of June 19, 1907, appointing the Federal receiver, and from the order of July 15, 1907, refusing to vacate the order appointing Dorchester receiver. Thereupon the matter came on for hearing in the Circuit Court of Appeals, and that court, holding that the state court had first acquired

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jurisdiction in the matter, reversed and vacated the order of the Circuit Court appointing a receiver, and remanded the case to the Circuit Court, with directions to discharge the receiver, and to tax all the costs of the receivership against the complainant. 158 Fed. Rep. 705.

If the state court had acquired jurisdiction over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well-settled principles, often recognized and enforced in this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction. The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty. *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, and previous cases in this court cited therein at page 54.

The Circuit Court of the United States, in the appointment of a receiver in this case, seems to have proceeded upon the theory that the proceedings in the state court had left the property in such a situation that it was no longer *in custodia legis*, and was liable to seizure by adverse proceedings.

This situation had arisen, in the view of the Circuit Court, because the Waters-Pierce Oil Company had given a bond securing the amount of penalties awarded against it by the judgment, and had also given a bond in the sum of $100,000 in order to suspend the powers of the receiver to act pending the appeal; and, in the view of the learned circuit judge, the court of last resort of the State of Texas had established the rule that

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an appeal from such order, and the giving of the security required by the court, had the effect of returning the property to the owner, and to make the order appointing the receiver inoperative. "It appears to me," says the learned judge, "that they [the Texas cases] announce the doctrine that the powers of the receiver cease, and that the adverse party takes the security which the law furnishes, and the defendant takes his property, with the right to use, control and dispose of the same." 158 Fed. Rep. 717.

The Circuit Court of Appeals in this case, after reviewing the Texas cases, reached a different conclusion, and held that the rulings of the Supreme Court of Texas showed that the appeal and the giving of the bond had only the effect of suspending the order appointing the receiver, and that the court had not lost jurisdiction over the property by the bond given to supersede the order made.

If the courts of Texas had acquired jurisdiction over this property, and the subsequent procedure amounted to simply suspending the order appointing the receiver, then we are of opinion that the Federal court had no right to intervene. If it is established that the state court had acquired jurisdiction over this property before the application in the Federal court was made, the court of the State had the right to determine for itself, while continuing to lawfully exercise its prior jurisdiction, how far it would permit any other court to interfere with such possession and jurisdiction. *People's Bank* v. *Calhoun*, 102 U. S. 258, 261.

As already stated, after the case reached the Court of Civil Appeals of Texas an application was made for relief against the receiver appointed by the United States Circuit Court, and to obtain possession of the property. That court maintained (103 S. W. Rep. 836) that the state court had acquired jurisdiction over the property; that the effect of the appeal was simply to suspend the order appointing the receiver, and that the appellate court still had jurisdiction over the *res* the same as the trial court had; and the court cited the decisions

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of the Supreme Court of Texas which seem to support that view.

The Court of Civil Appeals subsequently affirmed the order appointing the receiver, holding that the proceeding was authorized under the act of April 11, 1907, and the general statutes of Texas, authorizing the appointment of a receiver where a corporation had forfeited its corporate rights. Article 1465, Sayles' Stats. of Texas.

Upon application to the Supreme Court of Texas that court refused to allow a petition in error to be filed, and the case was brought here, being No. 360, *ante*, just disposed of, in which we held no Federal question was raised, *ante*, p. 112.

The case also came before the Supreme Court of Texas, and is reported in *Waters-Pierce Oil Company* v. *The State*, 106 S. W. Rep. 326. In that case application was made by the Attorney General in the Supreme Court of the State for the appointment of a receiver, and the court, in deciding the motion stated its reason for recalling the mandate issued by the Court of Civil Appeals upon the motion of the Waters-Pierce Oil Company, and also passed upon the application of the Attorney General of the State of Texas for an order revoking the order recalling the mandate of the Court of Civil Appeals, or a direction of the Supreme Court that the state receiver take actual and physical possession of the property and conduct the same under the order of the Supreme Court until the final disposition of the case.

The grounds stated for the former order, recalling the mandate of the Court of Civil Appeals, were that as the appellant, the Waters-Pierce Oil Company, had the right to present an application for a writ of error to the Supreme Court, the clerk of the Court of Civil Appeals had no authority to issue the mandate on the judgment of that court until the time had expired for an application for writ of error to the Supreme Court, and the mandate was therefore withdrawn to await the action of the Supreme Court upon the application for writ of error. As before stated, that application for writ of error has since been

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denied. In stating its decision on the motion to withdraw the mandate the Supreme Court of Texas said:

"That decision in no wise interferes with any authority that the District Court or the receiver could lawfully exercise over the property of the oil company during the pendency of that appeal."

In considering the effect of the appeal the Supreme Court of Texas cited the previous cases in Texas, and used the following language (106 S. W. Rep. 330):

"This court has no power to direct or authorize Eckhardt to take charge of the property of the defendant company, when the statute expressly provides that the giving of the appeal bond shall suspend the action of the court in that regard. If the appeal did not have the effect to suspend the execution of the order, the judge had authority to limit the appointment, as he did by his order, in which it is thus expressed: 'And now, on this, the 15th day of June, 1907, in open court, it is ordered by the court in the above cause that $100,000 be and the same is hereby fixed as the amount of bond which the defendant shall be required to give in order to supersede the judgment of the court placing defendant's property in the hands of a receiver; and it is further ordered that, upon the approval of the court and the filing with the clerk by defendant of a good and sufficient bond conditioned as required by law for said amount, further proceedings herein be suspended pending appeal. But this order shall not affect or rescind the order heretofore entered prohibiting and enjoining the defendant, its servants, officers, agents, and attorneys, from removing any of its property or assets beyond the limits of the State of Texas; but said injunction shall remain in full force and effect pending the appeal from the order appointing a receiver herein.' We do not, however, intimate a doubt upon the proposition, which we have asserted, that the appeal, by the filing of the bonds by the defendant in that court, suspended the operation of the order appointing the receiver until the final decision of the case."

The Supreme Court of Texas has therefore decided in this case

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as we think it had held in its former decisions, cited in the opinion of Judge Shelby, speaking for the Court of Appeals in this case, that the effect of the appeal and bond was merely to suspend the order appointing the receiver pending the determination of the appeal.

In this attitude of affairs had the Circuit Court of the United States authority to take possession of the property under the bill filed in that court for the appointment of a receiver?

We think the law of this court is well established to be that jurisdiction over the property was acquired by the state courts when the receiver was appointed, the judicial process served, and the receiver duly qualified, although the state receiver had not taken actual possession of the property. This principle was recognized in *Farmers' Loan & Trust Co.* v. *Lake Street Electric Rwy. Co.*, 177 U. S. 51, 61, in which this court said:

"The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of co-ordinate jurisdiction from exercising like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdictions embrace the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, to administer trust or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts. *Peck* v. *Jenness*, 7 How. 612; *Freeman* v. *Howe*, 24 How. 450; *Moran* v. *Sturges*, 154 U. S. 256; *Central National Bank* v. *Stevens*, 169 U. S. 432; *Harkrader* v. *Wadley*, 172 U. S. 148."

If this rule is not applied, a court of competent jurisdiction,

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which by the law of its own procedure has acquired jurisdiction of property, may find itself, as in this case, after final judgment maintaining its right over the property, at the conclusion of the litigation deprived of the subject-matter of the suit. Indeed, this case would be an apt illustration of that situation. The courts of Texas have sustained the right to the receivership, and have held it was only suspended pending the appeal, but when it comes to enforcing the right to administer the property, if the Federal receivership is maintained the court of original jurisdiction finds itself stripped of the property and the same being administered in another court, which acquired its dominion over the property after it had become subject to the state jurisdiction.

It is further contended that this case is controlled by the principles laid down in *Shields* v. *Coleman*, 157 U. S. 168. But in that case, before there was an attempt to appoint a receiver and take possession of the property by the second proceeding, the first receiver had been discharged and the property restored to the owner, who had given a bond for the forthcoming of the property to answer the judgment. In this case the receivership had merely been suspended when the application was made to the Federal court, and the receiver's bond was conditioned to account for the rental value of the property pending the appeal.

A special ground for the appointment of a receiver by the Federal court is said to exist in the danger that the Waters-Pierce Oil Company might be made the subject of prosecutions and its officers interfered with or intimidated pending the appeal and while the receivership was in abeyance because of the appeal from the order appointing him. When a similar contention was made in the Supreme Court of Texas in support of the application of the State for the appointment of a receiver in that court, the Supreme Court of Texas said:

"If in the use of its property the Waters-Pierce Oil Company should violate the laws of the State during the pendency of its appeal, it would be liable to prosecution and punishment in the same manner as for acts done before the trial of this case; and if

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the safety of the persons in charge of the property is endangered in any manner the courts are open to them to seek their protection where the jurisdiction has been lodged by the constitution of this State for such purposes. The trial court has no less power now to prevent a violation of the laws of this State by the conducting of the business of the Waters-Pierce Oil Company than it had before the trial." 106 S. W. Rep. 331.

It is submitted by the counsel for the petitioners that the effect of the appointment of the receiver in the state court was to violate the right of the Waters-Pierce Oil Company to carry on its business of an interstate character. It is true that the original proceedings which resulted in forfeiting the permit of the Waters-Pierce Oil Company to do business in the State of Texas resulted in a judgment forfeiting the permission theretofore given by the State, except the interstate business of the company.

If the proceedings for the appointment of a receiver had been sustained as merely in aid of the original judgment, and for the purpose of carrying that into effect, there would have been cogency in this argument. It is to be remembered that the state courts of Texas have sustained the proceedings for the appointment of a receiver (No. 360, *ante*, p. 112), not only under the act of April 11, 1907, which makes special provision for carrying out judgments under the anti-trust laws of the State and for the appointment of a receiver in such cases, but have maintained as well the right of the courts of Texas to appoint the receiver under the general statutes of the State of Texas (§ 3, art. 1465, Sayles' Statutes), giving authority to apply in any court of competent jurisdiction in certain cases, among others, where a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.

The Texas courts have the right to construe their own statutes, and their judgment in such matters is conclusive upon the Federal courts. We have, therefore, a case where the appointment of a receiver has been sustained by the highest court of the State under a general statute giving the right to appoint re-

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ceivers in such cases and to take possession of the property of the corporation in the State.

This statute was admittedly in force before the permit of the Waters-Pierce Company to do business within the State of Texas was granted. Under this statute, no less than the special act of April 11, 1907, the courts of the State have held that the receivership can be maintained under the procedure had in this case, and that the appeal merely suspended the receivership. In that view there is no unlawful interference with the rights of the company to transact interstate commerce business.

Upon the whole case, we are of opinion that the courts of Texas had not lost the jurisdiction which they had acquired by the appointment of the receiver, and that the Federal court ought not to have appointed a receiver to take possession of the property. We think the Circuit Court of Appeals was right in reversing the order of the Circuit Court appointing the receiver. In that court the costs of the receivership were assessed against Palmer, the original complainant. The receivership has gone on pending the proceedings upon appeal and we are of opinion that justice will be done if the costs of the receivership are paid out of the fund realized in the Federal court, and it is so ordered; otherwise the judgment of the Circuit Court of Appeals is

Affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* CENTRAL STOCK YARDS COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 51. Argued December 10, 11, 1908.—Decided January 25, 1909.

A provision in the constitution of a State that a carrier must deliver its cars to connecting carriers without providing adequate protection for their return, or compensation for their use, amounts to a taking of property without due process of law within the meaning of the Four-

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teenth Amendment; and so held as to §§ 213, 214 of the constitution of Kentucky.

The law must save the rights of parties and not leave them to the discretion of the courts as such.

Where a general provision in the constitution of a State is void as taking property without due process or compensation, and compensation has not been provided by statute, the defect cannot be cured by the courts inserting provisions for compensation in judgments under such constitutional provision.

The duty of a carrier to accept goods tendered at its station does not require it to accept cars offered by competing roads at arbitrary points near its terminus for the purpose of using its terminal station. A law requiring the carrier so to do is unconstitutional as taking property without due process of law.

97 S. W. Rep. 778, reversed.

THE facts are stated in the opinion.

Mr. Helm Bruce, with whom *Mr. Henry L. Stone*, *Mr. James P. Helm* and *Mr. Kennedy Helm* were on the brief, for plaintiff in error:

So far as concerns interstate shipments of live stock, the whole matter is concluded by the judgment of the Federal court in the former litigation in *Central Stock Yards Co.* v. *Louisville & Nashville R. R. Co.*, 192 U. S. 568, and that judgment is a bar to the relief sought in this case as to such interstate shipments. *Dupasseur* v. *Rocherau*, 21 Wall. 130; *Embry* v. *Palmer*, 107 U. S. 3; *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter House Co.*, 120 U. S. 141; *Deposit Bank* v. *Frankfort*, 191 U. S. 499; *Cromwell* v. *Sac County*, 94 U. S. 353; *Smith* v. *Auld*, 31 Kansas, 262.

Sec. 213, Kentucky constitution, as construed by the highest state court, in so far as it attempts to control interstate shipments, is void as attempting to regulate interstate commerce. *Central Stock Yards Co.* v. *Louisville & Nashville R. R. Co.*, 118 Fed. Rep. 120, and cases there cited; *McNeil* v. *Southern Ry.*, 202 U. S. 543; *Central of Georgia* v. *Murphy*, 196 U. S. 194; *Houston &c. Ry. Co.* v. *Mayes*, 201 U. S. 321.

Sec. 213, as so construed, in requiring plaintiff in error to

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deliver up possession of its cars to another railroad company, deprives the former of its property without due process of law. McGehee on Due Process of Law, 291; *Mo. Pac. Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Minnesota* v. *Chicago &c. R. Co.*, 36 Minnesota, 402; *Chicago, Burlington &c. Ry. Co.* v. *Chicago*, 166 U. S. 266; *Lankford* v. *County of Ramsay*, 16 Minnesota, 373, 375. The following cases, cited in opinion of court below, discussed and distinguished: *Peoria &c. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 109 Illinois, 135; *S. C.*, 50 Am. Rep. 605; *Burlington &c. Ry. Co.* v. *Dey*, 82 Iowa, 312; *S. C.*, 12 L. R. A. 436; *S. C.*, 31 Am. St. Rep. 477; *Jacobson* v. *Wisconsin Ry. Co.*, 71 Minnesota, 519; *S. C.*, 70 Am. Rep. 358.

Sec. 213, as so construed, in requiring plaintiff in error to devote its terminals in Louisville to the use of other railroads and to mere local transfers not connected with the traffic of plaintiff in error, deprives it of its property without due process of law. *Atlantic Coast Line Ry. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1; *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287; *Martin* v. *District of Columbia*, 205 U. S. 135.

Mr. Joseph C. Dodd, with whom *Mr. John L. Dodd* was on the brief, for defendant in error:

The provisions of §§ 213, 214, Kentucky constitution, and §§ 818, 819, Kentucky General Statutes, as construed by the highest court of that State, do not deny the plaintiff in error any Federal right or privilege. *L. & N. R. R. Co.* v. *Central Stock Yards Co.*, 30 Ky. Law Rep. 18, 39; *Lake Shore &c. R. R. Co.* v. *Smith*, 173 U. S. 697; *Minn. & St. L. Ry. Co.* v. *Minn. R. R. & Warehouse Co.*, 186 U. S. 261; *Penn. R. R. Co.* v. *Miller*, 132 U. S. 75; *Louisville Water Co.* v. *Clark*, 143 U. S. 1; *L. & N. R. R. Co.* v. *Kentucky*, 161 U. S. 677; *S. C.*, 183 U. S. 513; *M., K. & T. Ry. Co.* v. *Hughes*, 169 U. S. 613; *Penn. R. R. Co.* v. *Hughes*, 191 U. S. 489; *Houston & Tex. Cent. R. R. Co.* v. *Mayes*, 201 U. S. 321; *Chicago, Milwaukee &c. Ry. Co.* v. *Solan*, 169 U. S. 137, 138; *Chicago, M. & St. P. Ry. Co.* v.

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Becker, 32 Fed. Rep. 849; *Iowa* v. *Chicago, M. & St. P. Ry. Co.*, 33 Fed. Rep. 391, 395; Charter of Louisville Railway Transfer Company, Appendix, Part III, see § 5.

There is also a contract between the city of Louisville, the Louisville Railway Transfer Co. and the plaintiff in error. *Sherlock* v. *Alling*, 92 U. S. 99; *Nashville, C. & St. L. R. R. Co.* v. *Alabama*, 128 U. S. 96; *Hennington* v. *Georgia*, 163 U. S. 299; *N. Y., N. H. & H. Ry. Co.* v. *New York*, 165 U. S. 628.

The police power of the State cannot be bargained away or contracted against and when, within such power, a duty of a common carrier is required by constitutional or statutory provision the question of inconvenience or expense is immaterial. 4 Debates of Kentucky Const. Convention, 5118–5162; *Butchers' & Drovers' Stock Yards Co.* v. *L. & N. R. R. Co.*, 67 Fed. Rep. 36; *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128; *L. & N. R. R. Co.* v. *Kentucky*, 108 Kentucky, 628; *S. C.*, 26 Ky. Law Rep. 597; *L. & N. R. R. Co.* v. *Pittsburgh & Kanawha Coal Co.*, 111 Kentucky, 960; *S. C.*, 23 Ky. Law Rep. 1318; *L. & N. R. R. Co.* v. *Williams*, 95 Kentucky, 199; *S. C.*, 15 Ky. Law Rep. 548; *Burlington, C. R. & N. R. R. Co.* v. *Dey*, 82 Iowa, 336; *Peoria & P. N. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 109 Illinois, 139; *Jacobson* v. *Wisconsin, Minn. & P. R. R. Co.*, 71 Minnesota, 532; *Michigan C. R. R. Co.* v. *Smithson*, 45 Michigan, 221; *McCoy* v. *C., I., St. L. & C. R. R. Co.*, 13 Fed. Rep. 3; *Coe* v. *L. & N. R. R. Co.*, 3 Fed. Rep. 778; *Interstate Stock Yards Co.* v. *Railroad Companies*, 99 Fed. Rep. 472; *L., E. & St. L. Consolidated Ry. Co.* v. *Wilson*, 18 L. R. A. 105; *Railroad Company* v. *Goodridge*, 149 U. S. 680; *Inman* v. *St. L. S. W. Railway Co.*, 37 S. W. Rep. 37; *T. & S. F. R. R. Co.* v. *Denver & N. O. R. R. Co.*, 110 U. S. 667; *State* v. *Wabash, St. L. & P. R. Co.*, 83 Missouri, 144; *Mo. Pac. Railway Co.* v. *Wichita Grocery Co.*, 40 Pac. Rep. 899; *S. C.*, 2 Elliott on Railroads, §§ 1432, 1440; *Penna. R. R. Co.* v. *Jones*, 155 U. S. 333; *Daner* v. *N. Y. &c. R. R. Co.*, 50 How. 428; *Little Miami R. R. Co.* v. *Washburn*, 22 Ohio, 330; *Parker* v. *C. S. B. Q. R. R. Co.*, 56 Connecticut, 137; *Bosworth* v. *Chicago Ry. Co.*, 37

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Fed. Rep. 72; *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318; *Vincent* v. *C. & A. R. R. Co.*, 49 Illinois, 41; *Coe* v. *L. & N. R. R. Co.*, 3 Fed. Rep. 778; *In re Patterson*, 3 Fed. Rep. 89; *North* v. *Transportation Co.*, 146 Massachusetts, 315; *M. S. & I. R. R. Co.* v. *Day*, 20 Illinois, 375; *Beers* v. *Wabash, St. L. & P. R. R. Co.*, 34 Fed. Rep. 244; *L. & N. R. R. Co.* v. *Odell*, 33 S. W. Rep. 611; *Seasongood &c. Co.* v. *Tenn. & Ohio Transp. Co.*, 21 Ky. Law Rep. 1144; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 445; *Atlantic Coast Line R. R. Co.* v. *North Carolina Corp. Com.*, 206 U. S. 1.

Sec. 4 of the contract of plaintiff in error with the Bourbon Stock Yards to deliver to it all live stock brought over plaintiff in error's lines to Louisville, is in contravention of the laws of Kentucky, against public policy and void, and in no event relieves plaintiff in error of the duty imposed by law to receive, switch, and deliver such stock, destined to the Central Stock Yards, to connecting carriers for delivery at said Central Stock Yards. *L. & N. R. R. Co.* v. *Central Stock Yards Co.*, 30 Ky. Law Rep. 18, 39; *Bedford-Bowling Green Stone Co. &c.* v. *Oman &c.*, 115 Kentucky, 369; *S. C.*, 24 Ky. Law Rep. 2274; *L. & N R. R. Co.* v. *Pittsburgh & Kanawha Coal Co.*, 111 Kentucky, 960; *McCoy* v. *C. & I., St. L. C. R. R. Co.*, 13 Fed. Rep. 5; *Munn* v. *Illinois*, 94 U. S. 139; *Commonwealth* v. *L. & N. R. R. Co.*, 27 Ky. Law Rep. 497; *Anderson* v. *Jett*, 89 Kentucky, 375; *S. C.*, 11 Ky. Law Rep. 570; *Peoria & R. I. R. R. Co.* v. *C. V. M. Co.*, 68 Illinois, 489; *Inter Ocean Co.* v. *Associated Press*, 184 Illinois, 448; *Chicago & N. M. Ry. Co.* v. *People*, 56 Illinois, 365; *Sanford* v. *Railroad Co.*, 24 Pa. St. 382; *State* v. *Hartford & N. H. Ry. Co.*, 29 Connecticut, 538; *Coe* v. *L. & N. R. R. Co.*, 3 Fed. Rep. 778.

The shipper and owner of property, even after the delivery thereof to a common carrier, and after the bill of lading has been signed and delivered, or after the goods have passed from the possession of the initial carrier into that of a succeeding one, may either stop the same in transit or change the destination thereof. Hutchinson on Common Carriers (2d ed.),

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§§ 134, 337; *Sutherland* v. *Second National Bank of Peoria*, 78 Kentucky, 250; *L. & N. R. R. Co.* v. *Hartwell*, 99 Kentucky, 436; *Strahorn* v. *Union Stock Yards & Transfer Co.*, 43 Illinois, 424; Benjamin on Sales, § 830; Smith's Mercantile Law, Pomeroy's ed., § 634; *Michigan Southern & Northern Ind. Ry. Co.* v. *Day*, 20 Illinois, 375; *Lewis* v. *Galena & Chicago U. R. R. Co.*, 40 Illinois, 281; *London & N. W. Ry. Co.* v. *Bartles*, 7 Hurlston & Norman Reps. 400; *Scothorn* v. *Railway Co.*, 8 Exch. Rep. 345; *L. & N. R. R. Co.* v. *Kentucky*, 183 U. S. 513; *L. & N. R. R. Co.* v. *Williams*, 95 Kentucky, 199; *Minn. & St. Louis Ry. Co.* v. *Minn. R. & W. Co.*, 186 U. S. 261; *Munn* v. *Illinois*, 94 U. S. 113; *Davidson* v. *New Orleans*, 96 U. S. 97; *Railroad Commission Cases*, 116 U. S. 307; *Mobile County* v. *Kimball*, 102 U. S. 691; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299; *Lake Shore & N. S. R. Co.* v. *Ohio*, 173 U. S. 285; *Hennington* v. *Georgia*, 163 U. S. 299; *Livingston & Fulton* v. *Van Ingen*, 9 Johns. 507; *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460; *Robbins* v. *Shelby Tax District*, 120 U. S. 489; *Hopkins* v. *United States*, 171 U. S. 578; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628; *N. Y., L. E. & W. Ry. Co.* v. *Pennsylvania*, 158 U. S. 431; *L. & N. R. R. Co.* v. *Kentucky*, 161 U. S. 677; *S. C.*, 183 U. S. 503; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *S. C.*, 183 U. S. 517; *Penna. R. R. Co.* v. *Miller*, 132 U. S. 75; *Louisville Water Co.* v. *Clark*, 143 U. S. 1; *Jones* v. *Brim*, 165 U. S. 180; *Sherlock* v. *Alling*, 93 U. S. 99; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana State Board of Health*, 118 U. S. 455; *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96; *Mo., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613.

The decisions in the cases of *Central Stock Yards Co.* v. *Louisville and Nashville R. R. Co.*, 192 U. S. 568; *S. C.*, 118 Fed. Rep. 113, are not conclusive of the rights of the parties hereto. *Smith* v. *Auld*, 31 Kansas, 262; Black on Judgments (2d ed.), § 733; *Cromwell* v. *Sac County*, 94 U. S. 351; *Fairfield* v. *Gallatin County*, 100 U. S. 47; *Polk's Lessee* v. *Wendess*, 9

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Cranch, 87; *Nesmith* v. *Sheldon*, 7 How. 812; *Walker* v. *State Harbor Commission*, 17 Wall. 648; *Elmdorf* v. *Taylor*, 10 Wheat. 152; *Green* v. *Neal's Lessee*, 6 Pet. 291; *Leffingwell* v. *Warren*, 2 Black, 599; *Sumner* v. *Hicks*, 2 Black, 532; *Olcott* v. *The Supervisors*, 16 Wall. 678; *State Railroad Tax Cases*, 92 U. S. 575; *Rowan &c.* v. *Runnels*, 5 How. 134; *Suydam* v. *Williamson*, 24 How. 427; *In re Duncan*, 139 U. S. 499; *Leeper* v. *Texas*, 139 U. S. 462; *Bucher* v. *Railroad Co.*, 125 U. S. 555; *Louisville &c. Ry. Co.* v. *Mississippi*, 133 U. S. 587; *Beauregard* v. *New Orleans*, 18 How. 499; *Western Union Tel. Co.* v. *James*, 162 U. S. 650; *Wisconsin &c. Ry. Co.* v. *Jacobson*, 179 U. S. 287; *Lake Shore &c. Ry. Co.* v. *Ohio*, 173 U. S. 285; *Smith* v. *Alabama*, 124 U. S. 465; *Sherlock* v. *Alling*, 93 U. S. 99; *Minneapolis &c. Ry. Co.* v. *Minn. R. R. & W. Co.*, 186 U. S. 257; *Chicago &c. R. R. Co.* v. *Solan*, 169 U. S. 133.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding in equity prosecuted in the courts of Kentucky, similar in the main to one in the United States courts between the same parties, that was decided by the Circuit Court of Appeals in 118 Fed. Rep. 113, and by this court in 192 U. S. 568. The latter was brought by the Central Stock Yards Company, a Delaware corporation, against the Railroad Company, a Kentucky corporation, to compel it to receive live stock tendered to it outside the State of Kentucky for the Central Stock Yards station, and to deliver the same at a point of physical connection between its road and the Southern Railway, for ultimate delivery to or at the Central Stock Yards. The Central Stock Yards station is at the Central Stock Yards, just outside the boundary line of Louisville, Kentucky, on the Southern Railway Company's line, and by agreement between the two companies the Central Stock Yards were the live stock depot for the purpose of handling live stock to and from Louisville on the Southern Railway. The Louisville and Nashville Railroad, by a similar arrangement, had made the Bourbon Stock Yards its

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live stock depot for Louisville, and declined to receive live stock billed to the Central Stock Yards, or to deliver live stock destined to Louisville elsewhere than at the Bourbon Yards. There were physical connections between the Louisville and Nashville and the Southern tracks at a point between the two stock yards which was passed by the greater portion of the live stock carried by the Louisville and Nashville Company, and at another point that would be more convenient for delivery, a little further to the northward. In order to deliver as prayed the Louisville and Nashville would have been compelled either to build chutes or to hand over its cars to the Southern Railway. The right was claimed under the Interstate Commerce Act of February 4, 1887, c. 104, § 3, 24 Stat. 379, and the constitution of Kentucky, especially § 213, p. 147, Ky. Stats. Carroll, 1903. The Circuit Court of Appeals and this court agreed that the right was not conferred by the former act. As to the constitution of Kentucky, the Circuit Court of Appeals held that if it could be given any such construction as to make it purport to give the plaintiff a right to the relief sought, it would be making a void attempt to regulate interstate commerce. This court, on the general principle that a construction was to be adopted, if possible, that would save the instrument from constitutional objections, followed the suggestion of the Circuit Court of Appeals, read the section as not requiring the railroad to deliver its own cars, and affirmed a decree dismissing the bill.

The material sections of the constitution of Kentucky are as follows:

"SEC. 213. All railroad, transfer, belt lines and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, transfer, belt lines or bridges, or doing a railway business in this State, shall receive, transfer, deliver and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in car loads or less quantities, coming to or going from any railroad, transfer, belt line, bridge or siding thereon, with equal promptness and despatch, and without any discrimination as to

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charges, preference, drawback or rebate in favor of any person, corporation, consignee or consignor, in any matter as to payment, transportation, handling or delivery; and shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies. But this section shall not be construed as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business.

"SEC. 214. No railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier."

The present case was begun by the defendant in error earlier than the one just stated, and sought similar relief without regard to the place where the stock was received. A preliminary injunction was issued, and soon led to proceedings for contempt on the charge that it had been disobeyed. The court of first instance held that the injunction applied to an interstate shipment when the owner had sought to bill it to the Southern Railway at Louisville for delivery to the Central Stock Yards and had been refused, and thereafter, at the break-up yards, so called, of the Louisville and Nashville road, by giving notice to change the destination, had attempted to bring about the desired result. This decision was reversed by the Court of Appeals, *Louisville & Nashville R. R. Co.* v. *Miller*, 112 Kentucky, 464, and thereupon the beforementioned bill in the United States court was brought, to deal with interstate shipments, with a prayer, also, that the railroad be required to recognize changes of destination; while the present proceeding was kept on foot to cover all that it lawfully might. At a later date the petition, as it is called, in this case, was amended so as to pray that the plaintiff in error might be required, upon tender by the Southern Railway, to receive, at a point of physical connection

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with the Southern Railway, live stock from the Central Stock Yards, and to deliver the same to the consignee at the Bourbon Stock Yards or any depot on its line.

After the decision in the other case the Railroad Company asked leave to plead the decree as a bar to so much of the relief in the present action as relates to stock shipped or desired to be shipped from points outside of Kentucky to points within Kentucky. The trial court, being of opinion that the decree would not be a bar, refused leave, but ordered the proposed amendment to be made part of the record for the purpose of appeal. After final hearing a judgment was entered for the plaintiff, the defendant in error, granting all the prayers of the bill. The Railroad Company was ordered (1) to receive at its stations in Kentucky, and "to bill, transport, transfer, switch and deliver in the customary way," at some point of physical connection with the tracks of the Southern Railway, and particularly at one described, all live stock or other freight consigned to the Central Stock Yards or to persons doing business there. (2) It was ordered further, to transfer, switch and deliver to the Southern Railway at the said point of connection, "any and all live stock or other freight coming over its lines in Kentucky consigned" to the Central Stock Yards or persons doing business there. (3) It was ordered further, to receive at the same point and to "transfer, switch, transport and deliver all live stock" consigned to any one at the Bourbon Stock Yards, "the shipment of which originates at the Central Stock Yards;" with proviso requiring pay or tender of proper charges for its services, whenever demanded, at the time such live stock or other freight is offered. (4) Finally the Railroad Company was required, whenever requested by the consignor, consignee, or owner of the stock, "at any of the stations, and particularly at its break-up yards in South Louisville, Kentucky," to recognize their right to change the destination, and upon payment of the full Louisville freight rate and proper presentation of the bill of lading duly indorsed, the railroad was required to change the destination and deliver at a point of connection with the Southern Railway tracks for

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delivery by the latter to the Central Stock Yards. This judgment was affirmed by the Court of Appeals, whereupon this writ of error was brought. The points relied upon are that due credit was denied to the decree by the United States court; that if the constitution of Kentucky purports to authorize the requirement in the judgment as to delivery of shipments from outside the State, it attempts to regulate commerce among the States; that if the same instrument authorizes the requirement in the judgment that the Railroad Company should give up possession of its cars to the Southern Railway Company it attempts to deprive the railroad of its property without due process of law; and that the same constitutional objection applies to the attempt to make the railroad do switching work over its terminal property in Louisville between two points in the city when the shipment was neither coming into the city nor going out of the city over the lines of the plaintiff in error's road.

The Court of Appeals found itself unable to pass over the bridge laid by this court in its construction of the state constitution, § 213. It held that that section did purport to require the plaintiff in error to deliver its own cars, under the circumstances of the case, to the extent of the judgment that it affirmed. It declined to follow the decision of this court that for the purposes of the case before it, the two stock yards stood on the same footing as if they were the stations of two railroads placed side by side. It decided that the state constitution as construed by it did not attempt to regulate commerce among the States, and, no doubt for that reason, disregarded the former decree between the same parties, thinking, we presume, that, as the former bill dealt only with interstate commerce, the decree could have no binding effect as against a judgment which it deemed to affect only matters within the control of the State.

We are surprised that the Court of Appeals should have decided that the judgment appealed from did not deal with commerce among the States. The portion that we have numbered (2) ordered a delivery to the Southern Railway of all live stock and freight coming over its lines consigned to the Central Stock

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Yards, and this includes, of course, that coming from other States. The same is to be said of the requirement in (4) as to change of destination. When the live stock reached the point of connection or the break-up yards the carriage was not at an end, as appears by the very intent of the judgment, and as was decided in *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, 559. Moreover, that decision cited and approved the language of the Circuit Court of Appeals, to which we have referred already, in the case between these parties, to the effect that if the Kentucky constitution could be construed as the state Court of Appeals has construed it, it would be attempting what it could not do. *Ibid.*, 562. We think discussion of this part of the case unnecessary, and we should have to hold the provision of the state constitution void as applied, if we followed the construction given to it by the state court; but we are relieved of that necessity by the fact that those portions of the judgment of which we are speaking are invalid by reason of the previous adjudication of the United States court.

As we have indicated, the decree was pleaded as a bar only "to so much of the claim for relief as relates to stock shipped or transported, or desired to be shipped or transported from points outside of Kentucky to points within Kentucky." It was not argued that a decision that certain words in a constitution have a certain meaning, in a suit founded upon them, is conclusive as between the same parties in another suit upon the same words, for the same purpose, except that one is to enforce them with regard to matters outside the control of the State, and the other to enforce them with regard to matters within its control. Therefore we express no opinion upon the point. It was argued, however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property. In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case

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of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. See *Security Trust & Safety Vault Co.* v. *Lexington*, 203 U. S. 323, 333; *Roller* v. *Holly*, 176 U. S. 398, 409; *Connecticut River R. R. Co.* v. *County Commissioners*, 127 Massachusetts, 50, 57; *Ash* v. *Cummings*, 50 N. H. 591; *Moody* v. *Jacksonville, Tampa & Key West R. R. Co.*, 20 Florida, 597; *Ex parte Martin*, 13 Arkansas, 198; *St. Louis* v. *Hill*, 116 Missouri, 527. It follows that the requirement of the state constitution cannot stand alone under the Fourteenth Amendment, and that the judgment in this respect also, being based upon it, must fall. We do not mean, however, that the silence of the constitution might not be remedied by an act of legislature or a regulation by a duly authorized subordinate body if such legislation should be held consistent with the state constitution by the state court. We should add that the requirement in the first part of the judgment, which we have been discussing, is open to the objections mentioned in the former decision so far as it practically requires the Louisville and Nashville Railroad to deliver cars at Louisville elsewhere than at its own terminus. 192 U. S. 570, 571.

There remains for consideration only the third division of the judgment, which requires the plaintiff in error to receive at the connecting point, and to switch, transport and deliver all live stock consigned from the Central Stock Yards to any one at the Bourbon Stock Yards. This also is based upon the sec-

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tions of the constitution that have been quoted. If the principle is sound, every road into Louisville, by making a physical connection with the Louisville and Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. To require such an acceptance from a railroad is to take its property in a very effective sense, and cannot be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone. The Court of Appeals did not put its decision upon any supposed special liability, but upon the broad ground that the state constitution requires it and lawfully may require it of a common carrier by rail. Therefore the judgment must be reversed.

Judgment reversed.

MR. JUSTICE McKENNA, dissenting.

I am unable to concur in the opinion of the court so far as it applies to the transportation of cattle wholly within Kentucky. The difference between that and interstate transportation is important, for it was conceded at the argument that at least sixty per cent of the business was of domestic cattle.

This is a second review of the controversy between the parties. It was originally started in one of the courts of Kentucky, and there, meeting obstacles arising from the want of jurisdiction over interstate commerce, the latter was made the subject of a suit in a United States Circuit Court, where the Central Stock Yards Company suffered defeat, its bill being dismissed for want of equity. This judgment was affirmed by the Circuit Court of Appeals (118 Fed. Rep. 113), and subsequently by this court. 192 U. S. 568. This is pointed out in the opinion, but it may be well to see what was decided. In the Circuit Court

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of Appeals these propositions were decided: (1) Independently of statute, the railway could not be required to deliver to the Southern Railway Company for transportation to the Central Stock Yards Company the live stock, though shipped to and ultimately destined to the stock yards company. The Louisville and Nashville Company, the court said, performed its duty under the common law when it provided a place for disembarkation of the stock at the Bourbon Stock Yards, though that place was fixed by contract with the latter company. (2) That the refusal of the Louisville and Nashville Company to make such transfer of stock to the Southern Railway Company was not a violation of § 3 of the Interstate Commerce Act. (3) Considering the case more broadly and as involving the right to require one railroad to interchange traffic with another, the position of the Central Stock Yards Company would be untenable, because, as it was held at common law, a railroad is only bound to transport freight at its own terms. (4) If the constitution of Kentucky could be construed to require such delivery of the live stock, it was invalid in so far as it affected interstate commerce. The case, therefore, left local commerce untouched. It declared no principle that precluded a State by legislation, constitutional or statutory, to require such transfer of stock if it applied only to commerce within the State. The case came to this court, and here also it was considered only as it affected interstate commerce. It is true it was said that "if the cattle are to remain in the defendant's cars it cannot be required to hand those cars over to another railroad without a contract, and the courts have no authority to dictate a contract to the defendant, or to require it to make one." This expressed only a limit upon the power of the courts, not of a legislature or a constitution, for it was also said "there is no act of Congress that attempts to give courts a power to require contracts to be made in a case like this." And the cases which were cited sustain the view that the impotency of the courts was not because of a right in the railroads, which were exempt from legislative regulation, but a right only exempt from control by the courts in the

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absence of legislation. None of the cases declare otherwise. They interpreted the then existing legislation, and did not attempt to decide what legislation might be competent. Indeed, Judge Jackson (afterwards a justice of this court) in *Kentucky & I. Bridge Co.* v. *Louisville & Nashville R. R. Co.*, 37 Fed. Rep. 567, 634, strongly intimated that Congress had the power to do what he, exercising the powers of the Circuit Court, could not do without legislative authority.

I will assume, therefore, the power of the State to require an exchange of cars between railroads, and consider only what are the limitations upon the exercise of the power, not broadly, for the case has been brought into the narrow requirements of provision for compensation and security. Must such provisions be explicit in the law? May not the principle or rule of regulation be prescribed by law, statutory or constitutional, and the conditions of its application be ascertained and enforced by the courts or an administrative body? To what extent a court may be made an instrumentality in the administration of the laws of a State I may refer to the *Virginia Railroad Commission Cases*, 211 U. S. 210. See also *Kohl* v. *United States*, 91 U. S. 367.

If the State may so distribute its power of regulation it is certainly not within the province of this court to say that it has not done so against a contrary view, expressed or assumed, by the courts of the State. We can only deal with the result, that is, the ultimate action of the State, through any of its instrumentalities, as offending the Fourteenth Amendment of the Constitution of the United States. The procedure is for the determination of the State. This principle is conspicuously illustrated in *Waters-Pierce Oil Co.* v. *State of Texas*, *ante*, p. 86, and is also illustrated by the decisions under the Massachusetts and New Hampshire mill acts, *infra*. What, then, is the effect of the judgment under review?

It will be observed that the constitution puts an obligation upon railroad companies to "receive, transfer, deliver and switch empty or loaded cars," and to "move, transport, receive, load or unload all the freight in carloads or less quantities

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coming to or going from any railroad . . . with equal promptness and dispatch, and without any discrimination as to charges, preferences, drawback or rebate in favor of any person . . . in any matter as to payment, transportation, handling or delivering," and to "receive and transport all freight, from and to any point where there is a physical connection between the tracks of said companies." The constitution, therefore, imposes a duty, it is true, but not a duty to be uncompensated. The special emphasis of the prohibition of favor as to charges makes conspicuous and indisputable the right to make and enforce them if made and enforced without "favor to any person." There could be no discrimination "as to charges," if there were no charges, no drawback or rebate from them; and the right to require security for the return of the cars is left untouched. Nor have the constitutional provisions been limited by the decree under review.

It does not adjudge that the service required of the Louisville and Nashville Railroad should not be compensated. The right of the railroad company to charge for the use of its cars is declared. The court said that the transfer of the cars was a use of them in the interest of the public. "If this," the court further observed, "is in a sense the taking of its property for private purposes, appellant [defendant in error], as a common carrier, must submit to it, for it is only a temporary and necessary use of its property. Appellant cannot suffer loss by such use of its cars. If it delivers its cars to the Southern Railway Company to be taken to appellee [Central Stock Yards] for the loading and unloading of stock, that company has no right to detain them longer than a reasonable time for that purpose, and must return them. Appellant may charge a reasonable amount for the use of its cars, and if they are not returned, or if detained more than a reasonable time, it may sue the delinquent road for damages, or apply to a court of equity for a mandatory injunction to compel the return of cars. Indeed, it can suffer no loss which the law may not remedy." And the court pointed out that by regulations between railroads cars were inter-

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changed between them at a fixed charge. It is entirely consistent with the opinion that plaintiff in error may charge for the delivery of its cars, either when the cattle are shipped or when their destination is changed, or at the time of delivery to the Southern Railway Company. It is also entirely consistent with the opinion of the court that plaintiff in error can exact such stipulations from the Southern Railway Company as will protect it fully. The practice of connecting roads should be regarded, I think, when considering so simple a servitude as imposed in this case upon property devoted to a public use, and subject, because of such use, to regulation by the State. In this every right of plaintiff in error would be preserved. In this every power of the State would be preserved. I do not stop to make a comparison between such right and such power, but I submit this court should put no limit upon the latter that is not clearly necessary to preserve the other.

Plaintiff in error makes no question of precedent or ultimate payment for the use of its cars, or the absence of provisions for their return. It is contended that in some way (in what way is not pointed out) the State must exercise its right of eminent domain, and unless the right be exercised through an impartial tribunal there is not due process of law. It is also contended that there is an attempted transfer of terminals, and the duty of a local transfer company imposed on plaintiff in error, which in some way takes its property without due process of law. The question made then is of an inviolable right, impregnable in constitutional protection, against a legislative regulation such as in the case at bar, and to what contemplation does this bring us? If the right is impregnable in constitutional protection against regulation in the interest of *intra*state commerce it is also impregnable in such constitutional protection against regulation in the interest of *inter*state commerce. Are we prepared to announce that conclusion? The consequences of it are certainly quite serious.

The act of June 29, 1906, 34 Stat. 584, c. 3591, provided that "The term 'transportation' shall include all of the articles, in-

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strumentalities and facilities of shipment or carriage," and further provides that every carrier subject to its provisions shall "provide and furnish transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto." (Section 1.)

The act also provides that such carriers, upon the application of any lateral branch line of railroad or of any shipper, shall construct and operate switch connections and shall furnish cars for the traffic thereover. And the commission is given power to enforce such duty.

The commission is also given the power to divide a joint rate and establish joint rates and through routes. The commission further has the power to fix the compensation to be paid to the owner of property transported for any instrumentality furnished by him.

These are some of the regulations of interstate commerce, regulations of great reach and consequence, and they are not more specific as to compensation or security for the use or loss of cars than the constitution of Kentucky. And I submit that the power of a State over its domestic commerce is as great as the power of the Nation over interstate commerce.

The exigencies of this case do not require me to distinguish between those sovereign powers of the State denominated the power of eminent domain and the police power. Both may be exercised over private property. By the exercise of the first power property is taken and compensation for it is a necessary condition; by the exercise of the second power property is subjected to regulation and a provision for compensation is not necessary. When regulation is transcended and becomes a taking of property may, at times, be a close question, but the power of regulation must not be overlooked or underestimated. It is, as I have said, an exercise of the police power, and that is the most absolute of the sovereign powers of the State. We said in *Bacon* v. *Walker*, 204 U. S. 311, that it "extends to dealing with the conditions which exist in a State as to bring out of them the greatest welfare of its people." In *Otis Co.* v. *Ludlow Co.*, 201

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U. S. 140, this court sustained the Massachusetts Mill Act, which gave the right of one owner of land on a stream to flow the land of another, against the charge that it was contrary to the Fourteenth Amendment of the Constitution of the United States as taking property without due process of law, in that it made no adequate provision for the payment of damages caused by an exercise of the rights conferred by the act. The provision for payment was an action for damages. The use of property in that case was as complete and more enduring than in this, and we said of it: "The right of the lower owner only becomes complete when the land is flowed, and as, even then, it is not a right to maintain the water upon the plaintiff's land, but merely a right to maintain the dam subject to paying for the harm actually done, we see nothing to complain of in that regard." See *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9. This court, therefore, has decided that a simple action of damages is sufficient security for compensation for that use of property, which this court, and almost every court in the Union, has held to be a taking. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.

It is true it is held by the Supreme Judicial Court of Massachusetts that the principle upon which the Mill Act is founded is not the right of eminent domain, but the resulting general good of all or the public welfare. *Murdock* v. *Stickney*, 8 Cush. 113. And this court, yielding also to that purpose, has quite recently declared that a State might, in order to meet new conditions, elevate into a public use of property that which under other conditions had universally been held to be a private use. *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527. See also *Offield* v. *New York & N. H. R. R. Co.*, 203 U. S. 372.

Other cases may be adduced for illustration. I think, therefore, that it might easily be contended that the service required of plaintiff in error cannot be considered in any legal or practical sense a taking of property. Let us keep steadily in mind what it is that is required and what the requirement involves of the use of plaintiff in error's cars. It is a use not different from that

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they served from the moment of starting, or would serve if the end of the transportation be the Bourbon Stock Yards. If the end of the transportation be made the Central Stock Yards, there is the added element only that a limited and temporary possession of the cars is given to the Southern Railway Company, a possession, it must be said, not required in the interest of that company, but in the interest of the commerce of which it and the plaintiff in error are but instrumentalities, and as aids to which they were organized and are permitted to exist.

But I do not have to take this position, strongly supported as it may be. It is enough for my purpose that the constitution of the State provides for compensation for the duty it imposes on the railroads.

I am authorized to say that MR. JUSTICE HARLAN and MR. JUSTICE MOODY concur in this dissent.

ONTARIO LAND COMPANY *v.* YORDY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 59. Argued January 7, 1909.—Decided February 1, 1909.

Although a description may not be technically correct, if it identifies the land it will sustain a conveyance, or, as in this case, an assessment for taxes, and notice of sale therefor when delinquent; and, if the owner knows that the property so described is his, he is not, by reason of the deficient description, deprived of his property without due process of law.

Where, as in the State of Washington, tax proceedings are *in rem*, owners are bound to take notice thereof and to pay taxes on their property, even if assessed to unknown or other persons; and, if an owner stands by and sees the property sold for delinquent taxes, he is not thereby deprived of his property without due process of law.

44 Washington, 239, affirmed.

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On May 16, 1889, plaintiff's grantors, Chester A. Congdon and Clara B. Congdon, his wife, then the owners of the west half (W. ½) of the southeast quarter (S. E. ¼) and the east half (E. ½) of the southwest quarter (S. W. ¼) of section twenty-four (24), in township thirteen (13) north, range eighteen (18) east, Willamette meridian, excepting ten acres which belonged to Charles M. Holton, platted their land as "Capital Addition to North Yakima." According to the plat, in the central portion was a body of land marked "reserved" and not divided into lots and blocks. If it had been so divided the ground would have made four blocks, and to be in harmony with the other numbering would have been blocks 352, 353, 372 and 373. Nothing was shown on the plat to indicate the meaning of the term "reserved," nor the use to which the tract was to be applied. For the years 1892, 1893, 1894 and 1895 the proper assessor listed and assessed for taxation with other real estate that which he described as blocks 352 and 372 in "Capital Addition to North Yakima." All taxes on the property so listed for these years became delinquent. The county foreclosed the same in proceedings conforming to the statutes of Washington, and under the decree the property was sold and a tax deed executed to the defendant Jay Yordy, who paid all subsequent taxes levied thereon. After the platting by Congdon and wife, and in 1890, they deeded all the land to the plaintiff, describing it not by lots and blocks, but by the Government descriptions, and with no allusion to the Capital Addition to North Yakima. In September, 1904, after the tax deed had been executed, delivered and recorded, the plaintiff platted that portion of Capital Addition marked "reserved" as "Heerman's Addition to North Yakima," and subdivided said reserved tract into four blocks, numbered from 1 to 4 inclusive, each block being subdivided into 16 lots. The defendant Jay Yordy had already taken possession of the tract purchased by him, claiming it under his tax deed. On March 17, 1905, the plaintiff brought this action against the defendants to recover the property, describing it as lots in blocks 1 and 2 of Heerman's Addition.

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The plaintiff had actual knowledge of the fact that an attempt was being made to levy and collect taxes upon that portion of its property marked "reserved;" it denied the validity of such taxes in interviews with two county treasurers and stood quietly by during the foreclosure proceedings and tax sale. With full knowledge it permitted the purchaser to make his purchase without any protest, and only thereafter platted the reserved tract as Heerman's Addition to North Yakima. The trial court entered judgment in favor of the plaintiff, but that judgment was reversed by the Supreme Court of the State, which ordered a judgment in favor of the defendants. 44 Washington, 239. Thereupon the case was brought here on error.

Mr. Arcadius L. Agatin, with whom *Mr. William W. Billson* was on the brief, for plaintiff in error:

These lands were not described in the tax proceedings. So held, by the United States Circuit Court, in a case involving the same tax sale of the other half of the same unplatted tract. *Ontario Land Co.* v. *Wilfong*, 162 Fed. Rep. 999; *Rokendorff* v. *Taylor*, 4 Pet. 349; *Baldwin* v. *Winslow*, 2 Minnesota, 213; *Tallman* v. *White*, 2 N. Y. 66; *Zink* v. *McManus*, 121 N. Y. 259; *Miller* v. *Williams*, 135 California, 183, 185; *Schattler* v. *Cassinelli*, 56 Arkansas, 172; *Jones* v. *Pelham*, 84 Alabama, 208; *People* v. *Mahoney*, 55 California, 286; *Greene* v. *Lunt*, 58 Maine, 518, 534; *Bidwell* v. *Webb*, 10 Minnesota, 59; *Jackson* v. *Sloman*, 117 Michigan, 126; *Clemens* v. *Rannells*, 34 Missouri, 583; *Wooters* v. *Arledge*, 54 Texas, 395; *Jackson* v. *Delaney*, 13 Johns. 552; *Mitchell* v. *Ireland*, 54 Texas, 301; Kleber, Void Sales, § 354, and cases cited.

The lack of description is not cured by the owner's personal knowledge of the tax, whether accidentally derived, or otherwise. The Washington tax proceeding is purely *in rem*. *Williams* v. *Pittock*, 35 Washington, 271; *Woodward* v. *Taylor*, 33 Washington, 1; *Spokane* v. *Abitz*, 80 Pac. Rep. 192; *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 332.

It is not enough that the owners may by chance have notice,

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or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them a right to a hearing and an opportunity to be heard. *Stuart* v. *Palmer*, 74 N. Y. 188, 195; *Railroad Tax Cases*, 13 Fed. Rep. 722, 753; *Roller* v. *Holly*, 176 U. S. 398, 409.

The tax proceedings not having described the property, were not, as against it, due process of law. *Ontario Land Co.* v. *Wilfong*, 162 Fed. Rep. 999.

A description was indispensable. Ballinger's Code, §§ 1749, 1751, 1751½, 1751*b*.

There can of course be no valid judgment *in rem* without either an actual seizure, or some notice-conveying act which the law can treat as a constructive seizure, of the *res*. *Windsor* v. *McVeigh*, 93 U. S. 274; *Leigh* v. *Greene*, 193 U. S. 79; *Longyear* v. *Toolon*, 209 U. S. 414; *Londoner* v. *Denver*, 210 U. S. 373.

The state judgment in this case was wanting in due process, in that it awarded to defendants affirmative relief upon a distinct cause of action which had not been pleaded, and to which therefore the jurisdiction of the court did not extend.

It assumes to supplant the title by force of a tax judgment and sale upon whose validity a hearing was denied. Ballinger's Code, §§ 4912, 4913.

Mr. Benjamin S. Grosscup for defendants in error:

It is the policy of the State of Washington to sustain tax titles. Errors of a technical character in assessments and foreclosure proceedings are disregarded. So long as substantial justice is done, real estate is not permitted to escape the burden of taxation, and the title to land is not permitted to remain for years under the cloud of a title forfeited by the owner's failure to promptly bear his share of the burden of government. *Spokane Falls & N. Ry. Co.* v. *Abitz*, 38 Washington, 8; *Carson* v. *Titlow*, 38 Washington, 196; *Rowland* v. *Eskeland*, 40 Washington, 253; *Shipley* v. *Gaffner*, 7 Wash. Dec. 400; *S. C.*, 93 Pac. Rep. 211.

A tax law is within the fundamental requirement of due

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process if the owner at some stage is given opportunity to be heard, and a requirement that he shall give security to pay or deposit the just amount of tax as a condition to the prosecution of a suit is not a denial of a Federal right. *McMillen* v. *Anderson*, 95 U. S. 37.

The courts of Washington exercise broad revisory power over the acts of taxing officers. *Templeton* v. *Pierce County*, 65 Pac. Rep. 553.

This court will not look beyond the Federal question unless such Federal question has been decided erroneously by the state court. *McLaughlin* v. *Fowler*, 154 U. S. 663.

The state court having correctly decided the legal question and examined into the question of fact as to whether the property involved was taxed, this court will not review that finding. *Dower* v. *Richards*, 151 U. S. 658; *King* v. *Portland*, 184 U. S. 61, 70.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The contention of plaintiff in error in the state courts, as shown by the record, and also stated in the certificate of the Chief Justice of the Supreme Court of the State, is that sustaining the tax proceedings, divests it of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States. At the time of those proceedings, while the land in controversy was within the limits of the Capital Addition to North Yakima, it had not been divided into lots and blocks, but was simply marked on the official plat "reserved." In other words, according to the record there was no such property as that described, and nothing to identify any property. There being no legal description, no official identification, no one could, by an examination of the records, know what property was the subject of the proceedings. Hence, they were void, and no one was bound to take notice of them. But land may be identified, although not tech-

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nically or officially described, and the identification may be sufficient to sustain a contract, or conveyance. The owner of property is bound to take notice of the time and place provided for tax proceedings. He knows that his property is subject to taxation. The plaintiff was the owner of the entire Capital Addition to North Yakima. It was charged with notice of the fact of the platting and the condition shown by the plat. Examining the tax proceedings, it would find that four blocks not named on the plat, but within that addition, were listed and assessed for taxation. It would also know that if the tract reserved had been divided into blocks and lots and numbered in harmony with that of the balance of the addition, blocks 352, 353, 372 and 373 would occupy the place of the tract marked "reserved." It, therefore, had notice by the record that the authorities were listing and assessing for taxation certain blocks and lots which occupied the place marked upon the official plat as "reserved." It also had notice that that tract marked "reserved" was not otherwise listed or assessed for taxation, and that if its entire property was listed and assessed, the words "blocks numbered 352," etc., were used by the authorities for describing the "reserved" tract. Could it ignore these facts because the description in the tax proceedings was not officially or technically correct or sufficient? But the case does not rest on this presumption. It appears from the testimony of the county treasurers that the plaintiff knew that the authorities were attempting to assess and tax this "reserved" tract under the description of blocks 352, etc., so that it had not merely notice from the record, but notice in fact, that the tract marked "reserved" was being assessed for taxation under the description of blocks 352, etc., and in no other way. The general rule in reference to description in conveyances is thus stated by Jones on Real Property, § 323:

"The first requisite of an adequate description is that the land shall be identified with reasonable certainty, but the degree of certainty required is always qualified by the application of the rule that that is certain which can be made certain. A

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deed will not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey. The office of a description is not to identify the land, but to furnish the means of identification. The description will be liberally construed to afford the basis of a valid grant. It is only when it remains a matter of conjecture what property was intended to be conveyed, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels."

The statutes of Washington provide that:

"Any judgment for the deed to real estate sold for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid, or the real estate was not liable to the tax or assessment." 1 Ballinger's Code, Statutes of Washington, § 1767.

In Washington proceedings for the collection of taxes upon real property are *in rem*. *Spokane Falls & Northern Railway* v. *Abitz*, 38 Washington, 8; *Allen* v. *Peterson*, 38 Washington, 599; *Rowland* v. *Eskeland*, 40 Washington, 253; *Shipley* v. *Gaffner*, 48 Washington, 169, 171.

In this last case it was said by the court:

"We have repeatedly held that these tax foreclosure proceedings are *in rem*, and not against the person of the owner, and that owners are bound to take notice of the property they own and pay the taxes thereon and defend against foreclosure for delinquent taxes, even though the property is assessed to unknown persons or to other persons." See also *Carson* v. *Titlow*, 38 Washington, 196, 198.

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We are of opinion that the Federal question in this case was rightly decided, and the judgment of the Supreme Court of Washington is

Affirmed.

WATERS-PIERCE OIL COMPANY v. DESELMS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 62. Argued January 8, 1909.—Decided February 1, 1909.

In the construction of a statute a superfluous negative may be omitted where the meaning is apparent, as in this case.

Where the subject is within the power of the State it is not within the province of the judiciary to disregard statutory standards on the ground that the legislature did not act wisely in enacting them.

Provisions for unequal punishment of corporations and individuals for violations of the same statute, *held*, in regard to the Oklahoma Territory Oil Inspection Law, to be separable, and, even if unconstitutional, not to affect the prohibitions contained in the statute against the use of oil not conforming to the standards fixed thereby.

Under the circumstances of this case, this court will not hold that the Supreme Court of Oklahoma erred in judicially noticing a custom in the Territory to use coal oil in kindling fires.

While the burden on the plaintiff is not satisfied by showing an accident and an injury, where there was adequate proof to show that an explosion occurred which could only have occurred by the unlawful character of articles sold by defendant, a peremptory instruction for defendant is properly refused.

Where the original vendor knowingly sells, as coal oil, a mixture of coal oil and gasoline, of such inflammable character as to be unlawful under the local statute, to a vendee who in ignorance of its unlawful nature sells it to a third party in like ignorance, the original vendor is directly responsible to the final purchaser for the consequences of an explosion, produced solely by reason of such unlawful nature while the oil is being used in a legitimate manner. In such a case the responsibility of the original vendor rests not on contract but in tort.

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On the facts in this case, and in view of the ignorance of both vendees in regard thereto, the unlawful character of the articles sold *held* to be the proximate cause of plaintiff's injuries; but *quære*, and undecided, whether the original vendor would have been relieved of responsibility if the first vendee had knowledge of the unlawful character of the article.

Held, in a case on error to the Supreme Court of the Territory of Oklahoma, that this court does not possess the power to grant a new trial solely on the ground that the jury awarded excessive damages.

When the court, at defendant's request, has charged as to the general rules of ascertaining plaintiff's damages, it is not error to add that the amount, as in this case for death of infant children, had not been fixed by the evidence, and that the verdict must be the result of the jury's own judgment.

If an ambiguity exists in the charge counsel should at the time ask the court to remove it.

18 Oklahoma, 107, affirmed.

THE facts are stated in the opinion.

Mr. John W. Shartel, with whom *Mr. J. D. Johnson*, *Mr. James R. Keaton* and *Mr. Frank Wells* were on the brief, for plaintiff in error:

The plaintiff's case is not made by showing the negligent admixture and his purchase of a portion of that mixture. He also takes the burden of proving it to have been the efficient cause of the fire; that the accident would not have happened if the oil had not had the gasoline in it; and that the accident is the result of its super-inflammability. *Haff* v. *Minneapolis & St. Louis Ry. Co.*, 14 Fed. Rep. 558; *Willoughby* v. *Chicago & N. W. Railway*, 37 Iowa, 432; *Kelsey* v. *Jewett*, 28 Hun, 51; *Central R. R.* v. *Freeman*, 75 Georgia, 331; *Harrizan* v. *Chicago & I. R. Co.*, 53 Ill. App. 344; *A., T. & S. F. R. R. Co.* v. *Aderhold*, 49 Pac. Rep. 83; *Mobile & O. R. Co.* v. *Wilson*, 76 Fed. Rep. 127; *Mo. Pac. Ry. Co.* v. *Porter*, 73 Texas, 307; *S. C.*, 11 S. W. Rep. 324; *T. & N. O. Ry. Co.* v. *Crowder*, 63 Texas, 505; *C. & O. Ry. Co.* v. *Sparrow's Admr.*, 98 Virginia, 630, 641; *S. C.*, 37 S. E. Rep. 302; *N. & W. R. R. Co.* v. *Cromer's Admr.*, 99 Virginia, 763; *S. C.*, 40 S. E. Rep. 54; *Southern R. R.*

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Co. v. *Hall's Admr.*, 102 Virginia, 135; *S. C.*, 45 S. E. Rep. 867; *N. & W. Ry. Co.* v. *Poole's Admr.*, 40 S. E. Rep. 627; *Yaggle* v. *Allen*, 48 N. Y. Supp. 827; *Grant* v. *Railroad Co.*, 31 N. E. Rep. 220; *Pueblo Light Co.* v. *McGinley*, 38 Pac. Rep. 425; *McBroom* v. *Putney*, 28 Indiana, 353; *Connor* v. *Pacific Ry.*, 81 S. W. Rep. 149; *Loop* v. *Litchfield*, 42 N. Y. 351; *Losee* v. *Clute*, 51 N. Y. 494; *Davidson* v. *Nichols*, 93 Massachusetts, 514; *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. Rep. 400; *Cleveland &c. Rd.* v. *Ballantyne*, 84 Fed. Rep. 937; *Standard Oil Co.* v. *Murray*, 119 Fed. Rep. 575.

Section 2, Ch. 21, Session Laws of 1899 (Oklahoma), is void, in that it is utterly unintelligible when it is borne in mind that the Baume scale for liquids lighter than water is an inverse scale so that a reading of forty degrees denotes a heavier oil than a reading of forty-six degrees.

The gravity test cannot be upheld as a police regulation, because if the statute is read downward on the Baume scale, it would exclude the Pennsylvania oils; and if this statute is read upward it would have the effect to exclude everything from the market of Oklahoma except Pennsylvania oils. This testimony is uncontradicted, and the law is void. *Priewe* v. *Wisconsin State Land Co.*, 67 N. W. Rep. 918; *State* v. *Santel* (Iowa), 82 N. W. Rep. 445; *Matter of Jacobs*, 98 N. Y. 98; *State* v. *Smith*, 58 Minnesota, 35; *State* v. *Julow*, 129 Missouri, 163; *Janesville* v. *Carpenter*, 77 Wisconsin, 288; *St. Louis* v. *Door* (Mo.), 41 S. W. Rep. 1094; *Mugler* v. *Kansas*, 123 U. S. 623–667; *Corrigan* v. *Gage*, 68 Missouri, 541; *Haines* v. *Cape May*, 50 N. J. L. 55; *Kimmish* v. *Ball*, 129 U. S. 466; *Scholenberg* v. *Pennsylvania*, 171 U. S. 1; *Smyth* v. *Ames*, 169 U. S. 466; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Railroad Co.* v. *Gill*, 156 U. S. 649; *People* v. *Marx*, 2 N. E. Rep. 29; *S. C.*, 99 N. Y. 377.

The court will take judicial notice of the facts which conclusively show that the gravity test of the act in question is not a valid police regulation. Sutherland on Stat. Constr., §§ 301–306.

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Instructions 5, 6 and 7 were clearly erroneous and should not have been given.

The plaintiff had no right to go to the jury on the question as to the usual and ordinary purposes for which coal oil is ordinarily used, nor to have submitted to the jury a supposed custom, because those are matters of pleading and evidence, and the evidence is entirely silent on the subject, as well as being unsupported by any allegation in the petition. *Mobile Fruit Co.* v. *Judy*, 91 Ill. App. 82; *Lindley* v. *Bank*, 76 Illinois, 629; *Hayden* v. *Grillo*, 42 Mo. App. 1; *Gans* v. *Palo Pinto Co.*, 71 Texas, 99; *S. C.*, 8 S. W. Rep. 634; *Hendricks* v. *Middlebrooks*, 44 S. E. Rep. 835.

If the custom had arisen into the dignity of a law of the land, it was the court's duty to have so instructed the jury as a matter of law, and not leave the subject to them to deal with. *Buyck* v. *Schwing*, 100 Alabama, 355; *S. C.*, 14 So. Rep. 48; *Robertson* v. *Wilder*, 69 Georgia, 340; *Wilson* v. *Bannan*, 80 Illinois, 493; *Careby* v. *Frick*, 8 Maryland, 163.

Custom or usage must be proved. The jury's knowledge of it cannot be availed of. *Senluc* v. *Pritchard*, 4 Louisiana, 160; *Tryson* v. *Laidlaw*, 18 Louisiana, 380.

It was not a custom dignified with a force the equivalent of a law of the land. It required pleading and proof, and could not be submitted to the jury in the absence of appropriate allegations supported by proof. *Packard* v. *Van Scoic*, 58 Illinois, 79; *Randall* v. *Koehler*, 60 Maryland, 37; *S. C.*, 11 Am. Rep. 169; *Murray* v. *Hatch*, 6 Massachusetts, 465; *Livingston* v. *Maryland*, 7 Cranch, 506.

It was error on the part of the court to tell the jury that the question of damages could not be fixed by the evidence but must be the result of their own judgment.

The verdict of the jury for $14,500 for wrongfully causing the death of the four-year-old child and two-year-old child would denote an equivalent of $7,250 for each child, which is far out of range of what any court has sustained, as appears in the following cases. *Vicksburg* v. *McLean* (Miss.), 6 So. Rep.

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774; *Wells* v. *Railroad Co.*, 78 N. Y. Supp. 999; *Fleming* v. *Loebel* (N. J.), 59 Atl. Rep. 27; *Little Rock Ry.* v. *Barker*, 33 Arkansas, 350; *Myers* v. *San Francisco*, 42 California, 214; *North Chicago R. R.* v. *Wixon*, 51 Ill. App. 307; *Parsons* v. *Mo. Pac. Ry.*, 6 S. W. Rep. 464; *S. C.*, 94 Missouri, 286; *Riley* v. *Salt Lake R. Co.*, 37 Pac. Rep. 681; *S. C.*, 10 Utah, 428; *Hively* v. *Webster Co.*, 91 N. W. Rep. 1041; *S. C.*, 117 Iowa, 672; *Rowe* v. *Telephone Co.* (N. J.), 48 Atl. Rep. 523; *Connaughton* v. *Sun Printing Co.*, 76 N. Y. Supp. 755; *Graham* v. *Traction Co.*, 44 Atl. Rep. 964; *Louisville & Nashville Ry. Co.* v. *Creighton* (Ky.), 50 S. W. Rep. 227; *West Chicago St. Ry. Co.* v. *Nabie*, 77 Ill. App. 176; *Fox* v. *St. Ry. Co.*, 118 California, 55; *S. C.*, 50 Pac. Rep. 25; *Con. Trac. Co.* v. *Graham*, 40 Atl. Rep. 773; *McDonald* v. *Steel Co.* (Mich.), 103 N. W. Rep. 829.

Mr. A. H. Huston and *Mr. John Devereux* for defendant in error:

The negligence complained of need not be the only cause, or the most proximate cause, and negligence to be the proximate cause of an injury must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result. The question of proximate cause, whenever there is any doubt, must always be submitted to the jury. Bishop on Rights and Torts, §§ 450–455; *Baltimore R. R. Co.* v. *Kemp*, 61 Maryland, 74; *Terre Haute R. R. Co.* v. *Buck*, 96 Indiana, 346; *Scott* v. *Hunter*, 46 Pa. St. 192; *Milwaukee R. R. Co.* v. *Kellog*, 94 U. S. 469, 474; *Kansas City* v. *Gilbert*, 65 Kansas, 469; *A., T. & S. F. R. R. Co.* v. *Parry*, 67 Kansas, 515; *Hays* v. *Mich. Cent. R. R. Co.*, 111 U. S. 228.

Where there is no intervening efficient cause the original wrong must be considered as reaching to the effect and proximate to it. *Hays* v. *Williams*, 17 Colorado, 465; *The G. R. Booth*, 171 U. S. 450; *The Ontario*, 37 Fed. Rep. 220; *Railroad Co.* v. *Elliott*, 55 Fed. Rep. 949.

The rule that where there were no eyewitnesses to the origin

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of the explosion and fire, such origin must rest wholly in conjecture, and the case must fail for want of proof, does not apply where there is room for balancing the probabilities and drawing reasonable inferences which do account for the injury. *Schoepper* v. *Chemical Co.*, 113 Michigan, 582; *Gas Co.* v. *Carter*, 65 Kansas, 565; *Seybolt* v. *Railroad Co.*, 95 N. Y. 562; *Lutton* v. *Vernon*, 62 Connecticut, 1; *McBride* v. *Railroad Co.*, 19 Oregon, 64; *Railroad Co.* v. *Freeman*, 48 U. S. App. 757; *Toledo &c. Co.* v. *Chisholm*, 83 Fed. Rep. 652; *Stowell* v. *Standard Oil Co.*, 102 N. W. Rep. 227.

The determination of the question as to whether the injury resulted from a mere accident wherein no one was at fault, or was caused by the negligence of the party injured or whether it is attributable to the dangerous mixture, is a matter for the jury. *Pittman* v. *City of El Reno*, 2 Oklahoma, 414; *Ruch* v. *Gas Electric Co.*, 65 N. J. L. 399; *N. Y. &c. R. R. Co.* v. *New Jersey*, 60 N. J. L. 52; *Railroad Co.* v. *Middleton*, 57 N. J. L. 154; *Malnken* v. *Freeholder*, 41 Atl. Rep. 921; *Schoepper* v. *Chemical Co.*, 113 Michigan, 582; *Toledo R. R. Co.* v. *Chisholm*, 83 Fed. Rep. 1652; *Texas C. R. R. Co.* v. *Gentry*, 163 U. S. 353; *Burns* v. *Chicago &c. R. R. Co.*, 69 Iowa, 450.

It cannot be said as a proposition of law that the use of coal oil to kindle fires is contributory negligence. *Ives* v. *Weldon*, 114 Iowa, 476; *Riggs* v. *Standard Oil Co.*, 130 Fed. Rep. 199, 204; *Ellis* v. *Republic Oil Co.*, 133 Iowa, 11.

A person placing on the market for general use a dangerous explosive which he represents and sells as a safe illuminant, is liable for any damages caused by such substance either in the hands of his immediate vendee or a remote purchaser. The rule that a seller of an article of commerce not in itself dangerous, is not responsible for consequences to the purchaser of his vendee resulting from defects in the articles sold, does not apply in this case. *Elkins, Bly & Co.* v. *McKean*, 79 Pa. St. 493; *Judson* v. *Giant Powder Co.*, 107 California, 549; *Wellington* v. *Oil Co.*, 104 Massachusetts, 64; *Rose* v. *Stevens &c. Co.*, 11 Fed. Rep. 438; *Stowell* v. *Standard Oil Co.*, 102 N. W. Rep. 227;

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Clement v. *Crosby*, 111 N. W. Rep. 745; *Thomas* v. *Winchester*, 2 Seld. 397.

The burden of proving contributory negligence rests on the defendant, and it will not save the defendant, unless it has been established by a preponderance of the evidence. *Railroad Co.* v. *Horst*, 93 U. S. 291; *Hough* v. *Railroad Co.*, 100 U. S. 213; *Railroad Co.* v. *Gladman*, 15 Wall. 401; *Railroad Co.* v. *Harmon*, 147 U. S. 571; *Railroad Co.* v. *Phillbert*, 25 Kansas, 583; *Railroad Co.* v. *McCally*, 41 Kansas, 639.

The inspection law of Oklahoma is a valid act and must be interpreted so as to give effect to its *intent*.

The clear intent of the legislature was to exclude the lighter and more dangerous illuminants, and to admit the heavier and safer ones, and the obscurity in the meaning of the act which the plaintiff contends for in his brief, arises from confusing actual specific gravity, with the inverse scale of the Baume hydrometer.

This was a rightful subject of legislation and the legislature had full authority to enact it as a police regulation, for the protection of the people. *Patterson* v. *Kentucky*, 97 U. S. 501; *Shellabarger* v. *Commissioners*, 50 Kansas, 141; 1 Kent's Com. 461; *Henderson* v. *Robinson*, 76 Iowa, 603; *State* v. *Hope*, 100 Missouri, 347; *Bush* v. *Indianapolis*, 120 Indiana, 476; *Bingham* v. *Burmingham*, 103 Missouri, 345.

The court's instructions on the question of damages were correct, and the amount of damages given by the verdict was not excessive. *Railroad Co.* v. *Spence*, 23 S. W. Rep. 211; *Railroad Co.* v. *Barron*, 5 Wall. 90; *Gas Co.* v. *Carter*, 65 Kansas, 569; *Ihl* v. *Forty-second St. Ry. Co.*, 47 N. Y. 317; *Morris* v. *Railroad Co.*, 71 N. Y. Supp. 321; *Austin Rapid Transit Co.* v. *Cullen*, 29 S. W. Rep. 256.

MR. JUSTICE WHITE delivered the opinion of the court.

Deselms sued the Waters-Pierce Oil Company to recover damages for the death of his wife and two young children, resulting from an alleged explosion of a highly inflammable and

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explosive substance, consisting of a mixture of coal oil and gasoline. The mixture, it was alleged, had been bought by Deselms as coal oil from dealers who supposed it to be such, although their vendor, the oil company, knew the dangerous character of the article and yet had sold it as coal oil. The oil company answered by a general denial, and specially pleaded that if the accident in fact occurred it was caused by the negligence of Mrs. Deselms. Before trial Deselms dismissed the claim based upon the death of his wife. There was judgment on a verdict against the oil company for $14,500, which was affirmed by the Supreme Court of the Territory. 18 Oklahoma, 107.

On this writ the errors assigned, speaking in a general sense, complain of the action of the court below in affirming the trial court in giving, over exceptions of the oil company, certain instructions asked by Deselms, and in refusing to give various instructions asked by the oil company. For the purpose of clearness, however, we arrange the assignments under three headings: first, errors relating to the action of the trial court in giving and in refusing certain instructions; second, error in refusing at the close of all the evidence a request of the oil company for a peremptory instruction in its favor, on the ground that the proof as to negligence was not sufficient to justify submitting the case to the jury, and because, even if there was such proof, on the facts shown there was no legal right to recover; third, error in refusing a request concerning the method to be applied in fixing damages in the event the jury found for the plaintiff.

To dispose of these assignments it is necessary to take into view the law of the Territory relating to the inspection of coal oil, gasoline, etc., and the facts which the evidence tended to establish. Before coming, therefore, to directly consider the errors relied on we refer to these subjects.

In 1895 there was enacted in the Territory of Oklahoma a statute for the inspection "of coal oil, gasoline, or any other product of petroleum used as illuminating or burning fluids, by

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whatever name known." The statute specially provided, however, that when once duly inspected in the Territory the fluids subject to inspection might be shipped to any portion of the Territory without additional inspection. See Laws, 1895, § 1, p. 174.

This act was amended in 1899. Session Laws, 1899, p. 186. Section 2 of the act amended § 8 of the prior act to read as follows:

"All illuminating fluids that flash under the conditions as prescribed in section one at a less temperature than 120 degrees Fahrenheit, and have not a specific gravity of not less than 46 degrees Baume, that is, all oils which fail to stand both tests, shall be branded by the inspector 'Rejected,' and all such oils that do not flash at a less temperature than 120 degrees Fahrenheit, and which have a specific gravity of not less than 46 degrees Baume, as determined above, shall be branded 'Approved Standard Oil.' "

By § 3 the flash test was not to be applied to gasoline or other inflammable fluids, but they were to be tested "to determine the weight or specific gravity in the same manner as required by § 1 of this act to oils." It was further provided in the section that "All gasoline to be used in vapor stoves and gasoline lamps shall have a specific gravity of not less than 70 degrees Baume, and (at) a temperature of 60 degrees Fahrenheit." It was made the duty of the inspector to brand all packages, boxes or barrels of gasoline or other fluid having no fire test with the words "Highly Inflammable," and the specific gravity found by him. Where the gasoline was found to have a specific gravity of not less than 70 degrees Baume, at a temperature of 60 degrees Fahrenheit, the inspector was required to mark the same "Approved Standard Gasoline." By § 4 the sale by any person of oil or gasoline as approved standard oil or approved standard gasoline, when in fact the same was not of that grade, as found by the inspector of oils, was declared to be a misdemeanor punishable by fine and imprisonment. Any company or corporation furnishing oils or gasoline for sale in the Terri-

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tory of lower grades than that specified in the act was moreover made amenable to a fine.

The oil company had a wholesale depot at Guthrie, Oklahoma, for the sale of oil, gasoline, etc. At this depot there was a storage tank for coal oil, which in January, 1903, contained about 6,600 gallons of that fluid, which presumably had been inspected and tested according to law. Into this tank an employé of the company by mistake ran about 300 gallons of gasoline. When the mistake was discovered the agent of the oil company at Guthrie wrote to the manager at Dennison, Texas, informing him of the mistake. The manager replied, saying, "I cannot believe that this amount of gasoline will materially affect the burning quality of the P. W. Oil. At any rate, we will have to watch the matter, and take chances on selling all the P. W. Oil in P. W. Oil storage tank, trusting that the same will give good results." On receipt of these instructions the agent at Guthrie, without any renewed inspection of the oil in the tank containing the mixture of gasoline and coal oil, sold the same to merchants in his territory as coal oil. On January 28, 1903, three barrels of the mixture were so sold to Powers & Deselms, retail grocers at Orlando, Oklahoma. One of the barrels was sold by the firm to another merchant, and the two remaining barrels were taken to the store of the firm, and their contents placed in an empty tank used for that purpose. The barrels thus sold to Powers & Deselms bore no inspection brand, nor were the barrels inspected after they came into the possession of the firm. On the invoice, however, given to Powers & Deselms by the oil company, a charge for inspection fees was made, and Powers & Deselms had no knowledge of the real character of the material supplied as above stated. A few days after the sale to Powers & Deselms—on a Sunday morning—the plaintiff, Deselms, who was a clerk for the firm, bought one gallon of the mixture, supposing it to be coal oil, and took the same to his home in a two-gallon can. On the afternoon of the same day Deselms left Orlando for a brief absence. His wife and two children—one a boy of four, the

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other a girl of two years—were left at home. The children were bright and active and were in perfect health. It had been arranged that Mrs. Emory, a sister of Deselms, would remain at night with the family.

The dwelling was a one-story wooden structure, weather-boarded on the outside and lathed on the inside, the laths being covered with canvas, and the canvas then being papered over. The house had a frontage of twelve feet, ran lengthwise east and west about twenty-four feet, and was divided into two rooms. The east room was used as a kitchen, the cooking stove being near the east wall. The west room was the general living and sleeping room. In it was a heating stove composed of a cylindrical fire-box and a cylindrical plate or body with a door in the side. This stove stood on the east side of the room and it and the kitchen stove were connected with a brick flue in the partition wall between the two rooms.

The first use made of the gallon of oil bought by Deselms was on Tuesday evening, when Mrs. Emory filled a new lamp from the contents of the can, and then lit the lamp. Almost immediately flame shot out of the chimney. Mrs. Emory extinguished the light, trimmed the wick and lit the lamp again, and upon flame again issuing out of the chimney, thinking that the lamp was defective, she extinguished the light and made no further attempt to use the lamp. The oil can was then placed in the kitchen near the southwest corner of the room. During the evening a wood fire which had been burning in the heating stove burned out. The next morning, after lighting the kitchen fire, Mrs. Emory started to kindle a fire in the heating stove. She shook down the ashes, examined the contents of the ash pan and found that the stove was cold. She ceased her preparations to start a fire, however, on being asked to assist in dressing the children, Mrs. Deselms saying that she would make a fire in the stove later. There was no fire in the stove when Mrs. Emory left the house at about 8 o'clock on that (Wednesday) morning, and she was the last person to see alive Mrs. Deselms and the two children.

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We take from the opinion of the Supreme Court of Oklahoma a summary of the evidence relative to the subsequent destruction of the house by fire and the death of the wife and her two children:

"The plaintiff's house was discovered to be on fire at about ten o'clock in the forenoon, and upon the arrival of the first person on the scene it was so completely ablaze that it was impossible, on account of smoke and gases, to force an entrance into the building. About nine o'clock in the morning it had blown up cold from the northwest, and there was a high wind blowing from that direction at the time the fire occurred. Mr. Bradshaw was the first person to arrive at the building, and he broke in the back or kitchen door and tried to get into the other room, but was choked down by the dense smoke and gas, and came out. He tried a second time to enter the house, and was again choked and smothered by the smoke and gas, and had to retreat. He then ran around the house and tried to get in otherwise. About this time others came, and they broke in the north wall and found the plaintiff's son lying face downward on the bed near the northwest corner of the house, badly burned and life extinct, probably from suffocation. As the smoke cleared somewhat from the room they could see the body of the plaintiff's wife lying on the floor and what remained of the little girl on a couch. By pushing the building partly over, the charred bodies were taken out before the fire had completely burned out.

"After the fire and after the remains of the building had fallen in and been pushed aside and the fire partly extinguished, the heating stove was found inclined to the northwest, the floor being partly burned out beneath it; the top was off the stove and the upper hinge to the door broken, the door hanging by the lower hinge. There was paper, kindling and wood in the stove just a little charred. The plaintiff's wife was lying with her feet near the stove, her head away from it in a westerly direction in front of the stove door. Near her body was found the top or conical part of the oil can, the body of the can being

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found four to seven feet away in a southwesterly direction. These were the conditions existing at the time the fire was subdued sufficiently to admit of examination by those present."

The morning after the fire about a dozen pint bottles were filled from the mixture remaining in the tank at the store of Powers & Deselms. After being corked and sealed with plaster of paris the bottles were placed on shelves in a drug store at Orlando, the shelves being located fifteen to eighteen feet from a stove standing in the middle of the room, the temperature of the room being about 75 degrees. In about twenty minutes one of the bottles exploded, and the remainder were taken into the cellar. Subsequently the fluid in two of the bottles was tested and analyzed by George L. Holter, an expert chemist, who was then and for thirteen years had been professor of chemistry and metallurgy in the Agricultural College at Stillwater, Oklahoma. Testifying as to the analysis he had made, Professor Holter said he found by the use of a closed-cup tester that the material would flash at 60, which would indicate a flashing point of not more than 80 degrees in the open-cup test required by the statute. The witness made a "fractional distillation" of the fluid to ascertain if it had any light material in it to account for the low-flash test, and produced a distillate of practically 5 per cent of the original quantity, which, judging from the general appearances, smell and flash point, the witness said, was "what we generally term naphtha or gasoline." The flash point of this distillate was 37 degrees, while the flash point of the residue of the material from which the distillate had been taken was 95 degrees, which, allowing for a full 25 degrees of difference between the closed and open cup-test methods, would bring the flash point at about 120 degrees, according to the statutory method. The witness swore that the mixture of coal oil and gasoline at the ratio of 95 and 5 per cent, would be dangerous to use as coal oil. He, moreover, testified that ordinarily an explosion of three-fourths of a gallon of a mixture of coal oil and gasoline, such as had been examined, would generate a volume of gas fifteen hundred to eighteen hundred times

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that of the liquid. Further, the witness declared that while it would not be dangerous to use coal oil having a flash test of 120 degrees to start a fire, it would be dangerous to use the analyzed mixture for that purpose.

In the light of the foregoing we come to consider the assignments of error.

1. *The error alleged to have been committed by the trial court in giving to the jury, at the request of Deselms, four instructions, numbered 4, 5, 6 and 7, and the refusal to give two instructions, numbered 5 and 11, requested by the oil company.*

Instruction numbered 4 called the attention of the jury to the character and quality of the oils and gasolines which the statute of the Territory permitted to be sold, referred to the tests prescribed for ascertaining their quality, and pointed out that it was a criminal offense to sell products of petroleum which did not conform to the statutory standard. It is said that this instruction was based mainly upon the provisions of § 2 of the act of 1899, heretofore quoted, which section, it is insisted, is void, and therefore afforded no proper basis for consideration by the jury in determining whether the oil company had been negligent in putting the fluid in question upon the market. This rests upon the contention that the text of the statute is in effect meaningless, and that besides, even if it could be enforced according to its letter, the statute would lead to such an absurd result as would operate to destroy the very purposes which it was designed to accomplish. We think the contentions are without merit. As we have seen, the requirement of the statute as to specific gravity is that the oil shall "have not a specific gravity of not less than 46 degrees Baume." While the two negatives may apparently render the clause on its face confusing, if the superfluous negative be omitted all difficulty on this subject is removed, and the sentence would therefore provide that the oil must have a specific gravity of not less than 46 degrees Baume. This provision obviously exacts that the gravity of the oil shall be ascertained by the use of a Baume hydrometer, and it is the method of reading the scale of that instru-

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ment upon which is based the argument that, even with the superfluous negative omitted, the provision of the statute leads to an absurd result and gives sanction to the admission of dangerous while excluding safe oils. In ascertaining the specific gravity by the Baume scale the heavier the oil tested the lower will be the number indicated on the scale, and consequently the higher the number on the scale the lighter or more volatile will be the oil tested. This results because the Baume scale is to be inversely read. Now as the statute, omitting the superfluous negative, reads that the oil shall have a specific gravity of not less than 46 degrees Baume, the contention is that the statute excludes all oils lower than 46 degrees and permits all oils above 46 degrees to be sold as not dangerous. But we think when the context of the statute is considered and its provisions as to gasoline and the other light and highly inflammable fluids are taken into view, it becomes quite clear that while the words of the statute are somewhat confusedly expressed, arising from the fact the Baume scale is inversely read, that the plain purpose of the statute was to permit the use of oils which, when tested by the Baume hydrometer, indicated at least 46 degrees specific gravity, and to exclude all oils of a lighter character, that is, all oils which, when tested by the hydrometer, indicated a degree of gravity on the scale higher than 46. In other words, we think that when the provision of the statute is taken into view in connection with the inverse scale of the Baume hydrometer the requirement that the oil shall have a specific gravity of not less than 46 degrees Baume in effect was intended to exact that the coal oil permitted to be sold as not dangerous should be of no less gravity than 46, and therefore when tested should indicate not more than 46 degrees on the Baume scale.

Relying upon testimony which was offered tending to show that from some localities oils which are perfectly safe are obtained, although they have a specific gravity somewhat above 46 Baume, it is insisted that the law in question was not a legitimate exercise of the police power, since by selecting 46 degrees Baume as the standard, oils are excluded which would

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be as safe for use as oil complying with the standard fixed by the statute. But we think the court below was clearly right in deciding that, as the subject was within the police power of the State, it was not within the province of the judiciary to disregard the statute and treat it as void upon the theory that the legislature had acted unwisely in fixing the standard which the statute prescribed.

It is further contended that § 4 of the act of 1899 was void because of the alleged unequal punishment therein provided for persons and corporations performing the same act. But whether or not the section is subject to the criticism made against it, it is clearly separable from the rest of the act, as held by the court below, and in no wise affected the unlawful use within the Territory of oil which did not conform to the standard fixed by the statute.

The other instructions, Nos. 5, 6 and 7, which the assignment of errors assail, in various forms of statement submitted to the jury the following subjects: *a*, The liability of the oil company predicated upon the fact that the mixture in question was dangerous to be used for the usual and ordinary purposes for which coal oil is generally used; *b*, that it was knowingly sold by the oil company to be resold as coal oil; *c*, that the making use of coal oil to kindle or start fires was a general and universal custom or usage, and hence the oil company had reason to believe that the mixture so sold by it would be used for such a purpose; and, *d*, that the accident happened while the fluid was being used with ordinary care and caution, in the belief that it was coal oil, and for a purpose for which coal oil is usually intended and used.

In this connection it is to be observed that at the trial Deselms, the plaintiff, offered evidence tending to show that there was a general custom to make use of coal oil for kindling fires, but on the objection of the oil company the offered testimony was excluded, the court declaring it was of opinion that whether coal oil was generally used for the purpose claimed the subject was one of common knowledge and experience in the com-

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munity, and it was not necessary to offer proof in relation thereto, and, as shown by the instructions complained of, the determination of the existence of the custom or usage was subsequently left to the jury. In affirming the action of the trial court on this branch of the case the Supreme Court of the Territory held that the trial court had not erred in excluding the testimony as to the custom or usage in question, and that no prejudicial error had been occasioned by submitting the determination of the question to the jury, since the custom in the community was so universal that the court would have been authorized to have instructed the jury accordingly. In judicially noticing the existence of a usage or custom among persons generally within the Territory to use coal oil in kindling fires, we cannot say the court below erred, and, upon the hypothesis indulged, no error was committed in overruling the exceptions to the instructions. See *Ellis* v. *Republic Oil Co.*, 133 Iowa, 11.

We deem it unnecessary to particularly refer to the assignments of error relating to the refusal of the trial court to give to the jury certain instructions submitted on the part of the oil company, as the proposed instructions but embodied the converse of the propositions contained in instructions Nos. 5, 6 and 7, just disposed of. One of the instructions, however, was framed upon the theory that the case was controlled by the act of 1895, providing for the inspection of oils, etc., because of the alleged void character of the act of 1899, a contention which we have also previously adversely disposed of in considering that subject.

2. *The error alleged to have been committed by the appellate court in holding that the trial court rightly refused at the close of the evidence to give a peremptory instruction to the oil company.*

The errors assigned on this subject, as we have seen, are twofold, that is, the inadequacy of the facts to show that the accident was caused by the inflammable nature of the mixture and the absence of a legal right to recover, even if the proof

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justified submitting the question of fact to the jury. Concerning the first, the contention is that as the plaintiff was bound to make out his case by a preponderance of evidence, and as there were no facts in evidence from which an inference could properly be drawn that the accident might not have resulted if there had been no admixture of gasoline with the coal oil, or which authorized the inference that the loss was not caused solely by the negligence of the wife of the plaintiff, the peremptory instruction should have been given.

It is, of course, to be conceded that the burden of proof was primarily upon the plaintiff to establish the negligence charged, and it was not enough to show an accident and an injury. *Patton* v. *Texas &c. Ry. Co.*, 179 U. S. 658. We are, however, of the opinion that the court below was clearly right in deciding that the trial court had committed no error in ruling that the evidence was sufficient to require the submission of the case to the jury on the question of the cause of the accident. The highly inflammable character of the mixture was well illustrated by the testimony of Mrs. Emory, a sister of the plaintiff, that on filling a new lamp with the mixture and lighting it flame shot out of the lamp chimney. Undoubtedly the evidence directly pointed to the fact that the can which contained the fluid had been taken from the east room, where it usually was kept, to the room in which stood the heating stove. Clearly, also, the proof as to the unburned and charred or stained condition of the kindling wood in the heating stove, when connected with the removal of the can, tended to show that some of the fluid from the can had been applied to the kindling before it was ignited and preparatory to starting a fire. But the situation of the can after the fire and the place where the top of the can was found, clearly tended to rebut the implication that the fire had been lighted and fluid from the can then poured upon it. In view of the finding of the jury, as to the custom to use coal oil for kindling fires, and the knowledge which the oil company must be presumed to have had, that the fluid sold by it as coal oil would be used for this purpose, the mere inference

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that the oil from the can had been applied to the kindling before it was lighted afforded no ground for taking the case from the jury. Moreover, in view of the proof as to the condition of the kindling wood, of the situation of the can, of the condition of the stove after the fire, of the position of the bodies of the wife and the two children, and of the dense and large volume of gases which filled the premises at the outbreak of the fire, we think there was adequate proof from which the jury could have inferred that the accident was the result of an explosion caused by applying a light to the kindling wood in the stove after it had been saturated with fluid taken from the can, an accident therefore resulting solely from the wrong of the oil company in selling as coal oil a highly dangerous and inflammable mixture, unsafe to be used for the purpose for which, under the instruction of the court and the findings of the jury, coal oil was ordinarily used. It is unnecessary to further elaborate the subject because of the very full and accurate review of the tendencies of the proof in relation to the matter made by the court below in its opinion.

The contention that, although there was sufficient evidence to go to the jury as to the fact of negligence on the part of the oil company, nevertheless there was nothing in the tendencies of the proof to support the conclusion that the oil company was legally responsible for the accident rests on the proposition that as Deselms bought the oil, not from the oil company, but from the firm of Powers & Deselms, and therefore was only a remote vendee, there was no legal liability on the part of the oil company. This is based upon the propositions that there was between the plaintiff Deselms and the oil company, no contractual relation, and besides in any event the act of the oil company in selling the dangerous mixture to Powers & Deselms was not the proximate cause of the accident. As we have seen, however, there was evidence tending to prove, and under the instructions given to the jury their verdict must be taken as establishing the following facts: 1, that the oil company knowingly sold to Powers & Deselms a highly inflammable mixture of coal oil and

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gasoline in violation of the territorial statute, and that the oil company knew, or had reason to assume, that the mixture so sold would be retailed by its vendees (Powers & Deselms) to the public generally for domestic use as coal oil; 2, that Powers & Deselms purchased the mixture in question supposing it to be coal oil, and that the plaintiff, Deselms, bought the mixture from the firm in like ignorance of its real character; 3, that there was a general custom in the community to use coal oil for kindling fires, a use which would not have subjected persons so using it and exercising ordinary care to the appalling danger which would arise from the making use of the inflammable and dangerous mixture composed of gasoline and coal oil, a custom of which the oil company had knowledge or of the existence of which it is presumably charged with knowing. From these facts it is apparent that the responsibility of the oil company rested not on contract but in tort, and therefore the contention as to want of contractual relation is wholly irrelevant.

In *Savings Bank* v. *Ward*, 100 U. S. 195, relied upon by the oil company, it is true an attorney at law was held not to be liable to a third party for the negligent performance of a contract to examine the title to certain real estate, because of the absence of a contractual relation. But the distinction between the principle which was there controlling and the one which is here applicable was pointed out in the opinion of the court in that case, where it was said (p. 204):

"Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labelled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises, not out of any contract or direct privity between the wrongdoer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the

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hands of the person injured. *Thomas* v. *Winchester*, 2 Seld. 397, 410."

And the same principle was applied to a sale of dangerous oil in *Wellington* v. *Downer Kerosene Oil Co.*, 104 Massachusetts, 64, where it was said: "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for an injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault." And the like doctrine has been expounded in many cases. See, especially, *Elkins* v. *McKean*, 79 Pa. St. 493, and *Weiser* v. *Holzman*, 33 Washington, 87, where the doctrine is clearly and forcibly stated and the many authorities sustaining the same are cited. In view of the tendencies of the proof as to the entire absence of knowledge by Powers & Deselms, when purchasing from the oil company, and the ignorance of Deselms when he bought from the firm, of the character of the fluid, it is certain that in the case before us the act of the oil company, in any view, was the proximate cause of the accident, as no other independent and efficient cause or wrong can be legally said to have occasioned the same. *The G. R. Booth*, 171 U. S. 450.

But because we confine ourselves to the particular facts of the case before us we must not be understood as holding, in view of the dangerous character of the fluid and the putting of the same upon the market by the oil company, with the expectation that it would be retailed to the public, and the violation of the statutory regulations and prohibition concerning the sale of such article, that under the general principles of law sustained by the authorities already cited, a recovery against the oil company might not have been justified, even if the proof had established that Powers & Deselms had been informed by the oil company of the dangerous character of the mixture. See, further, *Clement* v. *Crosby*, 148 Michigan, 293, and *Stowell* v. *Standard Oil Co.*, 139 Michigan, 18, and authorities cited in both cases.

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3. *It remains only to consider error alleged to have resulted from the affirmance of the refusal of the trial court to give a particular instruction asked by the oil company concerning the subject of damages.*

In its general charge the court in substance instructed the jury that the measure of damages was the net value to the father of the services of his children during their minority. Thus the court said:

"Damages are intended to be compensatory and must be fair, reasonable and just. The father is entitled to the services of his son until he arrives at the age of twenty-one years, and of the daughter until she arrives at the age of eighteen; he is also charged with the expense of their support, maintenance, education and social training, and you must fix the amount which, in your judgment, will compensate him for any pecuniary loss he may have sustained."

And, later, the jury were cautioned that their verdict "must be based upon the evidence which the court has permitted to go to you."

On behalf of the oil company the trial judge was asked to give an instruction numbered 14, as follows:

"In determining the amount of your verdict for the plaintiff, if you find for such plaintiff, you should not take into consideration the pain suffered by the deceased or the wounded feelings of the father or other surviving relatives, but your verdict must be limited to such amount, if any, as you believe the plaintiff has suffered financially by reason of the death of his children. In other words, the recovery, if any, is to be a pecuniary compensation for a pecuniary loss, and such finding of loss must be based upon the evidence introduced in the case."

The court gave this instruction, with the addition at the end thereof of the following sentence: "The amount of damages cannot be fixed by the evidence, but must be the result of your own judgments."

We shall consider the exception in the light of the objections urged in the brief of counsel. In discussing the subject of ex-

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cessive damages counsel for the oil company thus treat of the modification of instruction No. 14:

"We submit, in the first instance, that it was error on the part of the court to tell the jury that the question of damages cannot be fixed by the evidence, but must be the result of your own judgment. While it is true that the amount of damages cannot be named or ascertained from specific evidence disclosing the amount of loss on the part of plaintiff, yet they must bear a relation to the evidence, and the vice of this instruction is that it cuts loose the minds of the jury from all regard to the evidence, and it is needless to say that they went the instant they were turned loose. The authorities cited later will fully cover this point in this instruction."

The authorities referred to are decisions of state courts of last resort dealing with the subject of excessive damages when allowed by juries for the negligent causing of the deaths of minors. They more particularly concern the duty of a court to grant or refuse a new trial where the damages are excessive, and where the action of the trial court in refusing a new trial was open to review in the appellate court. As it is clear that this court does not possess such a power (*City of Lincoln* v. *Power*, 151 U. S. 436; *Ward* v. *Joslin*, 186 U. S. 142, 153), we need not further notice the authorities relied upon.

That the correctness of the general instruction as to what were the elements of damage sustained by the father was not assailed by the oil company sufficiently appears from the argument of counsel above excerpted, which also evidences the fact that no question was intended to be made as to the non-production at the trial of witnesses to give evidence in respect to the net value of the prospective services of the children. Manifestly, the rule deemed by the court and counsel to be applicable, to quote language contained in the opinion in *Brunswig* v. *White*, 70 Texas, 504, was that "when from the age or undeveloped state of the child any estimate of value of the services until majority would be matter of opinion, in which no particular or especial knowledge in way of expert testi-

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mony could be procured better than the judgment and common sense of the ordinary juror called to the duty of determining such value—then, upon such testimony, the sound discretion of the jury can be relied on to determine the value, without any witness naming a sum." And see *Balto. & Ohio S. W. Ry. Co.* v. *Then*, 159 Illinois, 535, and *Birkett* v. *Knickerbocker Ice Co.*, 110 N. Y. 504.

The complaint that error was committed in the modification made of requested instruction No. 14, as stated by counsel, amounts therefore but to the assertion that thereby the jury were informed that they possessed power to capriciously fix the amount of damages. We are unable, however, to so interpret the language, especially when read in connection with the prior instructions of the court. The jury were not told that the "question" of damages could not be fixed by the evidence, but that the "amount" thereof had not been fixed. When they were further instructed that the amount of damages must be "the result of your own judgments," we think, in reason, the jury could only have understood that it was left to their sound sense and deliberate judgment to determine the amount of damage, from a consideration of the various elements entering into the damage, and the factors in evidence, viz., the age, health, condition in life of the children, etc. If counsel were of opinion that the modification as expressed was susceptible of being misunderstood by the jury, the court should have been asked to remove the supposed ambiguity.

Finding none of the assignments of error relied upon and which we have power to review to be well founded, it results that the judgment of the Supreme Court of the Territory of Oklahoma must be and it is

Affirmed.

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CRAWFORD v. UNITED STATES.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 92. Argued October 13, 14, 1908.—Decided February 1, 1909.

An agreement by an official of the United States under which he secretly receives any portion of what is paid for supplies furnished on his requisition is one to defraud the United States within § 5440, Rev. Stat.

An indictment which sets forth the details of a corrupt contract between defendant and a government official by which, from its nature, the Government would be defrauded, is sufficient to sustain a charge of conspiracy under § 5440, Rev. Stat., even if it does not allege in what particular manner the conspirators intended to defraud the United States.

In criminal cases courts are not as exacting in regard to the character of objections as in civil cases, and will notice error in the trial of a criminal case although the question may not have been raised in exactly the proper manner at the trial. *Wiborg* v. *United States*, 163 U. S. 632.

Where defendant was on trial for conspiracy under § 5440, Rev. Stat., an objection to a juror on the ground that he was a salaried official of the United States held in this case to reach to the qualifications of the juror by reason of his relations with the Government although he was not a salaried officer thereof.

The common law in force in Maryland on February 27, 1801, remains in force in the District of Columbia except as inconsistent with statutes subsequently enacted.

Under the common law one is not a competent juror who is master, servant, steward, counsellor or attorney of either party, and statutory provisions of qualifications, not inconsistent with this rule, do not strike it down.

In the District of Columbia jurors must, at least, have the qualifications stated in § 215, and are exempt under § 217 of the Code, but these sections are not inconsistent with, or exclusive of, the common-law rule that one in relation with either party is incompetent.

Bias disqualifies a juror, and bias is implied in the relation between employer and employé and actual evidence thereof is unnecessary.

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An employé of the United States is not competent as a juror where defendant is on trial for conspiracy against the United States under § 5440, Rev. Stat.

Where a letter written to defendant is admitted in evidence for the purpose of showing the moral character of defendant and that he had endeavored to destroy evidence in the writer's hands so as to prevent its being used against him on the trial, the answer immediately written should also be admitted, whether written by defendant or his counsel under his direction; and defendant's own evidence in regard to the matter alleged is admissible so as to disclose the whole transaction.

There is a presumption of harm caused by errors in regard to the admission or exclusion of evidence in a jury trial which requires the reversal of the judgment unless the record clearly shows the absence of harm.

The extent to which the law officers of the Government will use evidence of persons already convicted of the crime of conspiracy for which defendant is also indicted, is within their discretion, and their action will not be reviewed by the courts; but the evidence of such witnesses is to be received with caution and suspicion, and is not entitled to the same credence as that given to ordinary witnesses.

In considering whether error in excluding defendant's evidence in a criminal trial is reversible it is not enough that inferences favorable to defendant might have been drawn from some of the admitted testimony, he is entitled to state directly on oath facts that are relevant.

While a book of accounts may be inadmissible as evidence so far as it relates to accounts between the parties it may be admissible as written corroborative evidence, and as part of a transaction, to be submitted to the jury for what it is worth.

30 App. D. C. 1, sustained as to sufficiency of indictment and reversed on other points.

On the third of April, 1905, in the Supreme Court of the District of Columbia, the defendant was indicted, together with George E. Lorenz and August W. Machen, for a conspiracy to defraud the United States, by means stated in the indictment, and in relation to a contract between the Postal Device and Lock Company, a corporation of the State of New Jersey, and the Post Office Department of the United States, by which the company was to furnish certain satchels to the department for the use of the letter carriers in the free-delivery system of the Government.

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The indictment was founded upon § 5440 of the Revised Statutes of the United States, 3 Comp. Stat., page 3676, which reads as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

Nearly two years before the finding of this indictment (viz.: in July, 1903), the defendant had been indicted in the same court by two different indictments, relating to the same general subject-matter as the one found in April, 1905, one indictment charging him with conspiring (together with Lorenz and Machen) against the United States, by agreeing to present false bills of account to the Post Office Department, in relation to the contract mentioned, for supplying the department with satchels for letter carriers, in alleged violation of § 5438 of the Revised Statutes, 3 Comp., Stat. p. 3674. The other indictment was against the defendant individually for presenting false claims to a clerk in the Post Office Department under this same contract, and in violation of the same section of the Revised Statutes. Upon motion the three indictments were consolidated for the purpose of the trial of the defendant and were tried together, a severance in the conspiracy indictments having been granted upon the defendant's motion for his separate trial. The two indictments found in 1903 have been so disposed of in the court below that no question arises in regard to either.

Upon the trial the defendant was convicted, as hereinafter more particularly stated, and he then appealed from the judgment entered upon the verdict of conviction to the Court of Appeals of the District, where it was affirmed by a divided court, Mr. Chief Justice Shepard dissenting. 30 App. D. C. 1.

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Upon application of the defendant this court granted a writ of certiorari, and the case is now here by virtue of that writ.

Mr. A. S. Worthington for petitioner:

That part of § 5440 which refers to conspiracies to defraud the United States cannot be held to apply to a case where an official without wrongful intention is found in a position where his personal interest is in conflict with his duty to the Government. Criminal statutes must be strictly construed and so that it may be known in advance to what classes of acts they extend. *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Brewer*, 139 U. S. 278; *Todd* v. *United States*, 158 U. S. 278, 282; *France* v. *United States*, 164 U. S. 676, 682, 683; *Neal* v. *Clark*, 95 U. S. 704; *United States* v. *Britton*, 108 U. S. 199; *Spring Co.* v. *Knowlton*, 103 U. S. 49.

The juror Haley, who was challenged for cause, being in the employ of the United States, was disqualified and should not have been allowed to serve. 3 Blackstone Comm., 363; 1 Chitty, Crim. Law, 541, 542; 1 Bishop, New Crim. Procedure, § 902; *Block* v. *State*, 100 Indiana, 357; *State* v. *Berry*, Busbee, 330; *Mitchell* v. *Railroad Co.*, 63 Georgia, 173; *Atlantic Coast Line R. Co.* v. *Bunn*, 58 S. E. Rep. 538, 539; *Hubbard* v. *Rutledge*, 57 Mississippi, 6; *Louisville &c. R. Co.* v. *Mask*, 64 Mississippi, 738; *Railway Co.* v. *Cook*, 37 Nebraska, 435, 437; *N. P. R. Co.* v. *Herbert*, 116 U. S. 642.

The trial court committed a prejudicial error by allowing the prosecution to prove as part of its case in chief that the defendant had taken away from the office of the Fabrikoid Company certain letters and refusing to allow the defendant to explain why he took them, or what he did with them, and in allowing the prosecution to put in evidence Aspinwall's letter to Crawford charging the latter with abstracting a part of the files of the Fabrikoid Company and refusing to allow the defendant to offer in evidence the reply to that letter written at Crawford's request by his counsel.

The trial court should have allowed the defendant to intro-

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duce in evidence the entries in his account book from page 24 to page 31, and certainly to exhibit to the jury the specific entries in that book relating to his financial transactions with Lorenz in connection with the contract of June 25, 1902, between the Postal Device and Lock Company and the Post Office Department.

The Attorney General and *Mr. Holmes Conrad*, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States:

The facts charged, without more, constitute a fraud on the Government and are sufficient to show that the official action of the officer in question was influenced by the agreement. *Wardell* v. *Railroad Co.*, 103 U. S. 658.

A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not of itself criminal or unlawful, by criminal or unlawful means. *Pettibone* v. *United States*, 148 U. S. 203. The indictment charges that each of the acts done by the defendants, and by either of them, was done in pursuance of the unlawful agreement, and was done to defraud the United States.

It is not material to the offense charged that the United States should have been injured thereby. *Hyde* v. *Shine*, 199 U. S. 81.

The juror Haley was not a salaried officer of the Government and was therefore not disqualified. *United States* v. *Smith*, 124 U. S. 532; *United States* v. *Barber*, 21 D. C. 456. Even were Haley held to be in the employ of the United States, that fact would not disqualify him. The common-law qualifications of a juror are not in force in the District of Columbia. Congress has, by statutory enactment, prescribed the qualifications of jurors in the District and among those qualifications there does not appear the common-law feature of servant or even employé. Code, D. C., §§ 215, 217. The common law must be held to have been replaced by the two sections above quoted.

The trial court committed no error in refusing to admit the

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letter written by defendant's counsel to Aspinwall. The trial court alone has discretionary power to determine the order in which the proof in a case shall be admitted, and it is no abuse of such discretion to hold that the defendant shall not introduce his evidence until the prosecution has, in regular order, offered its evidence. The court also properly excluded the proffered explanation by the defendant as to his motive in taking the letter from Aspinwall's files. Wharton on Evidence, § 35; *Ibid*, 482.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The defendant was convicted on the first count of the indictment found in April, 1905 (which contained six counts), and was acquitted on the fifth and sixth counts. The court having previous to the trial sustained a demurrer to the second, third and fourth counts, there is nothing left under this indictment except the conviction of defendant on the first count, and the question to be considered at the outset is as to the sufficiency of that count. The grounds of the demurrer were that the indictment did not set forth any offense under § 5440 of the Revised Statutes of the United States, nor did it set forth any offense under any statute, or at common law; that as to the first count, it did not appear how the Government could have been defrauded by the alleged scheme of conspiracy, and that it is not alleged in the indictment that any payment to Machen under the agreement set forth in the count was intended to influence Machen's official action, and it is not alleged that the Government was to pay more than it would have had to pay if the alleged agreement between the defendants had not been entered into, and it is not alleged that the contract was not honestly awarded. These questions may be considered, notwithstanding the defendant, when his demurrer was overruled, pleaded over and went to trial on the plea of not guilty. See Code of District of Columbia, § 1532, p. 300.

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Without going into any very great detail, it is necessary to state what in substance is alleged in the first count. It is therein averred that Machen (one of the alleged conspirators) was the General Superintendent of the Division of Free Delivery of the Post Office Department of the United States, and that the department used satchels for letter carriers, which were supplied by contract, at a certain price named therein for each satchel, and in such numbers as the department might, from time to time, require. It was the duty of the General Superintendent to keep the department advised from time to time of the approaching expiration of existing contracts for furnishing supplies, and of the necessity for advertising for bids for contracts for the furnishing of supplies, including satchels for letter carriers, and also to advise as to the matter and form of such proposed contracts, and it was his duty to use his best and honest judgment as to the number of satchels that from time to time might be required for the use of the carriers under any contract that might be made. It was his duty to examine the bills for such of the satchels as had been delivered and approve them if correct, upon which payment would be made, in due course, by the Post Office Department. The defendant and Lorenz knew fully the duties pertaining to the office of General Superintendent prior to the making of the contract mentioned.

On the sixth of May, 1902, on the advice of the General Superintendent, the department advertised for the presentation to the department of bids up to June 6, 1902, for the supplying of satchels for letter carriers for four years from July 1, 1902.

On June 3, 1902, the defendant and Machen and one Lorenz, intending to defraud the United States, unlawfully and fraudulently conspired, "knowingly, wrongfully and corruptly to defraud the United States in a dishonest manner, and through and by means of a dishonest scheme and arrangement," which is then stated. The defendant was to procure the lock company, of which he was an officer, and which was a New Jersey

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corporation desiring to engage in furnishing supplies to the Post Office Department, to put in a bid for furnishing satchels for the department. He was also to procure the lock company, before the offer of the bid of the company to the department, to make a contract with Lorenz that if the bid of the lock company was accepted by the department, then whenever the lock company furnished any satchels to the department under such contract and received from the department payment therefor, the lock company would pay to Lorenz all of such amount exceeding the cost of manufacturing and delivering the same and twenty-five cents for each satchel. Pursuant to such agreement the lock company did enter into such a contract with Lorenz.

On June 3, 1902, the defendant and the General Superintendent and Lorenz, as part of their dishonest scheme, agreed that the money which was to be paid to Lorenz by the lock company should thereafter be divided between the defendant, the General Superintendent and Lorenz, in certain proportions unknown to the grand jury.

On the twenty-fifth of June, 1902, the United States, through the Postmaster General, made a contract with the lock company, by which the former agreed to purchase from the lock company at certain fixed prices so many satchels as might be needed by the department for four years from July 1, 1902.

On October 3, 1902, the defendant, in order to effect and carry out the conspiracy, presented a bill against the United States for $15,800, for five thousand satchels theretofore sold and delivered to the department, in accordance with the contract of June 25, 1902, with the lock company, and on October 13, 1902, in pursuance of the conspiracy the General Superintendent approved the bill as such Superintendent, the defendant receiving and accepting a warrant payable to the order of the lock company from the department, in payment of such bill for the amount thereof.

On the twenty-first of October, 1902, the defendant, in pursuance of the conspiracy, drew a check of the lock company

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upon Spencer Trask & Company, of New York, for $5,441.36, payable to the order of Lorenz, which he sent to Lorenz.

On October 28, 1902, Lorenz having received the check and obtained the money on it, sent to Machen, the General Superintendent, the sum of $900, by means of a draft procured by Lorenz, and sent by him to the Superintendent.

From this statement it appears that the count discloses the duties of the General Superintendent and the duty that he owed to the Government in relation to a contract of the nature above mentioned. It was part of his duty to give an honest and unprejudiced judgment, whether the contract was from time to time being fairly and fully complied with, both as to the number of satchels furnished, their material and workmanship, as well as with regard to all other matters pertaining to the contract. It cannot be supposed that such duty could be fully, impartially and honestly discharged by an officer who, by reason of his private and alleged corrupt agreement with the agent of the contractor whose work he was supervising, would obtain more pay by exceeding in his requisitions the number of satchels really necessary for the department. It could scarcely be believed that he would give an unbiased and honest judgment upon the question whether the contract had been fulfilled as to material or workmanship or other detail, when, if the satchels were received, he would at once, though secretly, receive a certain portion of the sum paid by the department to the contractor for furnishing such satchels. This is not an indictment for the violation of a statute against bribery. It is for a conspiracy to defraud the United States, and when it is seen that the conspiracy consists in such a corrupt agreement as is alleged in the indictment, by which an officer of the United States is, in substance, to have a secret interest in a contract as to the fulfilling of which by the contractor that officer is to be the judge, it becomes unnecessary to aver that the interest was given him, or the money paid to him to influence his official conduct upon the very contract in question. The agreement is alleged to have been an unlawful

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and fraudulent one, wrongfully and corruptly to defraud the United States. Its almost necessary result, if carried out, would be to defraud the United States. The fraud might be perpetrated by getting the contract at a higher price than otherwise would have been obtained, or, if already obtained, then the United States might be defrauded by the General Superintendent accepting improper satchels, not made of the materials, or in the manner specified in the contract, or by his requiring the delivery of more satchels than were sufficient for the wants of the department. It is not necessary in such a case as this (of an alleged unlawful and corrupt contract) to allege in the indictment which, of the various ways the Government might be defrauded, was in the minds of the conspirators, or that they all were. *Dealy* v. *United States*, 152 U. S. 539, 543. Such a corrupt agreement, if carried out, would naturally, if not necessarily, result in defrauding the United States by causing it to pay more for satchels than was necessary, or for more satchels, or possibly inferior ones, than it otherwise would, but for the corrupt agreement set forth. The indictment was sufficient. *United States* v. *Hirsch*, 100 U. S. 33; *Hyde* v. *Shine*, 199 U. S. 62, 82; *United States* v. *Keitel*, 211 U. S. 370.

Various questions arose upon the trial of the case, to some of which we will now refer.

In the course of empannelling the jury one John C. Haley was called as a juror and sworn upon his *voir dire*, and testified that he was a druggist; that he did not know the defendant; that he had formed no opinion about the case; that his drug store was a subpostal station, and that he was the clerk in charge; that he was technically a clerk of the city post office, and that he was paid an annual compensation of $300, which included all clerk hire and rental of the premises; that he was paid for the entire service of taking charge of the substation, and whatever rent may be necessary; that it is one of the things in connection with the drug business that can hardly be avoided; that a drug store, to keep up its prestige, must sell

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postage stamps, and might as well get paid for it as to do it for nothing. The counsel for the defendant then challenged Haley for cause, the objection stated being that he was a "salaried officer of the Government;" but the court overruled the challenge, to which ruling the defendant duly excepted. During the organization of the jury the defendant exhausted the peremptory challenges allowed him by law, and Haley sat as a member of the jury that tried the case.

The question is, Was Haley disqualified to sit as a juror, and did the court err in holding that he was not? Section 215 of the Code of Laws for the District of Columbia, page 49, provides as follows:

"SEC. 215. QUALIFICATIONS,—No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District, over twenty-one and under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful man, who has never been convicted of a felony or a misdemeanor involving moral turpitude."

Section 217 provides that "all executive and judicial officers, salaried officers of the Government of the United States and of the District of Columbia . . . shall be exempt from jury duty, and their names shall not be placed on the jury lists." Counsel for the Government contend that the objection by defendant's counsel to the juror Haley was founded, as shown by the record, on the ground that the juror was a "salaried officer of the Government;" that the juror was not such an officer, and that if he were, that fact is only ground for a claim on his part for exemption (which he did not make), and not a ground for disqualification. Even though the juror was not a salaried officer of the Government, under *United States* v. *Smith*, 124 U. S. 525, which was founded upon a statute concerning a very different subject, and as to which different reasons might apply, and even though such an officer was only exempt under § 217, and not disqualified under § 215, yet we are of opinion that the objection actually made reaches beyond the mere question

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whether technically the juror was or was not a salaried officer of the Government, and that it reaches the question of the qualification of a juror by reason of his relations to the Government as a post office clerk or employé, in a subpostal station, and whether such relations did not by law disqualify him from acting as a juror in an action to which the Government was a party. The objection to the juror was evidently by reason of his relations to the Government, however described.

In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made, as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception. *Wiborg* v. *United States*, 163 U. S. 632, 659.

Under this rule the general character of the objection to the juror was fairly before the court, and therefore we think it proper to notice the alleged error in the reception of this juror and to decide it with respect to the general qualification of the juror under the law, without being tied down to the question of whether he was a salaried officer and so exempt, but not, as is contended, thereby disqualified to serve as a juror.

The question as to the qualifications of a juror in this District is not in all cases a mere local one. If the objection is not based alone upon the wording of the section of the code above cited, but also upon the common law, it becomes an important question which might arise anywhere in the whole country. There may be statutes in the different States as to qualifications of jurors which in their construction would not prevent the application of the common law in regard thereto, and so the question of qualification being the same in the Federal as in the state courts (Rev. Stat., § 800; 1 Comp. Stat., p. 623), may be a general one. It is of special importance in this District, where there are so many thousands of clerks and employés of the Government, to know whether they are qualified jurors

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to sit on the trial of cases to which the Government is a party. If they be so qualified it might not be cause for much astonishment to see in this District a majority of a jury composed of such jurors.

Taking the contention of the Government to be sound, the fact that a proposed juror is a salaried officer of the Government can only be ground for his own claim of exemption, which, if not made by him, leaves him a competent juror. A jury composed of Government employés where the Government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead on that account to any doubt on that subject. We do not think that § 215 of the code of the District includes the whole subject of the qualifications of jurors in that District. If that section, together with § 217, were alone to be considered, it might be that the juror was qualified. But, by the common law, a further qualification exists. If that law remains in force in this regard in this District a different decision is called for from that made in this case. The common law in force in Maryland, February 27, 1801, remains in force here, except as the same may be inconsistent with or replaced by some provision of the code for the District. Code, § 1, chap. 1, p. 5. It has not been contended that the common law upon the subject of jurors was not in force in Maryland at the above-named date, or that it did not remain in force here, at least up to the time of the passage of the code. Jurors must at least have the qualifications mentioned in § 215, but that section does not, in our opinion, so far alter the common law upon the subject as to exclude its rule that one is not a competent juror in a case if he is master, servant, steward, counsellor or attorney of either party. In such case a juror may be challenged for principal cause as an absolute disqualification of the juror. 3 Blackstone (Cooley's),

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4th ed., page 363; *Block* v. *The State*, 100 Indiana, 357, 362. In the Indiana case, Judge Niblack, speaking for the Supreme Court of that State, held in substance in accordance with the above rule of the common law, and that the Indiana statute upon the qualifications of jurors did not strike out the rule of the common law on the subject, when not inconsistent with the statute. This rule applies as well to criminal as to civil cases. Mr. Chief Justice Shepard, in his dissenting opinion in this case, cites many cases to the effect that a clerk or employé of a private party or of a corporation is not qualified to sit as a juror in such a case, over the objection of the opposite side. Although the cases cited were civil cases and rest mainly on the common law, they are not lessened in weight on that account. On the contrary, they apply with added weight to criminal cases. Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

The position of the juror in this case is a good instance of the wisdom of the rule. His position was that of an employé who received a salary from the United States, and his employment was valuable to him, not so much for the salary as for the prospect such employment held out for an increase in his business

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from the people who might at first come to his store for the purchase of stamps, etc. It need not be assumed that any cessation of that employment would actually follow a verdict against the Government. It is enough that it might possibly be the case, and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict. It was error to overrule the defendant's challenge to the juror.

Upon the trial of the case the Government called as a witness John Aspinwall, who was the president of the Fabrikoid Company of Newburg, New York, and it appeared from his testimony that some time in 1902, and prior to the making of the contract between the lock company and the Post Office Department, the defendant had some correspondence with the Fabrikoid Company with reference to the availability and the cost of the material manufactured by that company for use in the manufacture of satchels to be used by the Post Office Department for letter carriers.

After the finding of the two indictments against the defendant, and some time in the latter part of 1903, the defendant visited the place of business in Newburg, New York, of the Fabrikoid Company, and requested the privilege of looking over the correspondence between himself and that company. For the purpose of proving what the Government asserted was a suppression or spoliation of evidence, the witness testified that the defendant was permitted to look over the files in the company's letterbooks and examine his letters to the company, and copies of its letters to him, the witness not being present when the defendant made such examination. Subsequently the witness discovered that a copy of a letter that the company had written to the defendant and dated April 21, 1902, had been removed from the copybook, and the index covering that letter had been erased. The letterbook was then produced by the witness from which the copy letter had been removed, and

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it was exhibited to the jury by counsel for the Government. Counsel for the defendant thereupon admitted that the defendant took the copy letter from the letterbook and made the erasure of the reference to the page, and the witness identified the letter then produced as the original which had been taken from the letterbook of the witness. The witness also identified a letter dated April 18, 1902, as a letter which he testified he had received from the defendant, and which counsel for defendant admitted defendant had taken at the same time he had taken the copy letter from the copybook. Counsel for the Government then read in evidence to the jury the letter from defendant of April 18, and also the letter from the witness dated April 21, replying thereto, which had been removed from the letterbook of witness's company. The Court of Appeals has held that both letters were in fact harmless, and that their contents would tend to negative the existence of any sinister intent of defendant in taking them. But evidence as to the intent of defendant in taking them was certainly proper, as is hereafter stated.

The witness Aspinwall further testified that when he discovered the loss of the letters he wrote to the defendant the letter dated December 7, 1903. Counsel for the defendant then admitted that he had the original of that letter, but stated that the witness might read it from his copybook. The letter was then read, in which the witness charged the defendant, in substance, with having surreptitiously removed from the files of the company a copy of the letter from the company to the defendant, and with having erased the page from the index. The letter of December 7 was then offered in evidence without objection.

As soon as the letter was admitted in evidence the counsel for the Government immediately offered the letter written by counsel for defendant in answer to it, but was stopped by the court with an inquiry as to its relevancy, which he answered by stating that he did not see its relevancy. The court observed he would hear from whoever offered the letter as to its

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relevancy, when counsel for Government said he did not desire to offer the letter, and that he had only offered it at the suggestion of counsel for defendant, who then moved to strike out the letter just received in evidence (that of December 7), on the ground that it was inadmissible unless coupled with the answer that might have been made to it. The court held that the letter from defendant's counsel could not be considered by the jury, but that the letter written by the witness Aspinwall to defendant was relevant as tending to prove that the defendant was charged by that witness with abstracting the letter from the files. The motion to strike out was denied, and the counsel for the Government then said that he did not offer the answer to the letter, which was accordingly not received in evidence. To obviate an objection that the defendant had no right to offer evidence while the case was with the Government, the defendant subsequently, when the case was with him, offered in evidence the letter written by his counsel, which on objection was ruled out.

It is plain that the letter from the witness Aspinwall to the defendant, making the charge that defendant took the letters, as above stated, was put in evidence by the Government for the purpose of endeavoring to show that the defendant had surreptitiously taken evidence which might possibly be used against him upon his trial. The response of defendant to such letter should have been admitted as explanatory of the letter of accusation. Without the letter of explanation the other letter should not have been received. The Court of Appeals held that it was difficult to understand the theory upon which the letter from Aspinwall to defendant was admissible, but as it was admitted, without objection, there was no error, and the subsequent motion to strike out the letter was addressed to the discretion of the trial court. It seems clear from the record that the letter of the witness to defendant was not objected to, under a belief by defendant's counsel, formed possibly upon some prior arrangement or understanding between counsel, that the answer to it would also, at once, be offered in evidence.

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Under these circumstances, and in the absence of the offered explanation, the letter of witness, making a charge of abstracting letters, should have been struck out on the motion made by defendant immediately upon the withdrawal of the offer in evidence of the answer to the letter. It was all one transaction, and the reception of the first letter without objection was at once followed up by the Government's offer of the answer, and when the offer was withdrawn it is too strict an enforcement of a general rule to hold that the motion to strike out was addressed to the discretion of the court. But the motion was not denied on any such ground. The record shows it was denied because the court held the letter proper to be put in evidence. The theory stated by the court was a mistaken one. It was wholly immaterial what charge was made by witness in the letter, separate from the action of defendant, in regard to the charge. Defendant was not on trial for abstracting the letter, and the statements therein were alone no evidence against defendant. If the letter were admitted, then the answer to it should also have been admitted. The court seemed to agree that if the answer had been made by the defendant personally, instead of by his counsel, it might have been admissible, but that as defendant did not himself write the answer it could not be admitted. The court stated, when the offer was first made by defendant's counsel to put the answer to the letter in evidence, that it was not proper to offer any of his evidence at that time, while the case was with the Government, but the answer was subsequently offered in evidence by defendant's counsel, when the case was with him, and, under objection, was again rejected. So the defendant had the accusing letter put in evidence against him and was not permitted to have his answer, through his counsel, admitted in reply.

Again, at the close of all the evidence, when counsel for the defendant once more moved to strike out the letter of witness Aspinwall, the court denied the motion on the ground that the evidence was of a nature to throw light on the minds of the jury upon the moral makeup of the individual, and thus enable

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the jury to come to a conclusion as to what his sworn word is worth. This reason was repeated in his charge, when the court said that while such evidence did not tend to indicate that the defendant was guilty, it was admitted to enable the jury to take into consideration what was the degree of moral sense that the defendant witness had.

When the letter was first offered and received in evidence on the part of the Government the defendant had not been placed on the witness stand and after he had been on the stand this evidence was retained, while the defendant was not permitted to show what his written answer to the charge of spoliation was, because the answer was written by his counsel (although by his direction and under his authority) and not by himself, personally. An explanation of the reason for his taking the letters might be quite material to enable the jury to come to a decision, as to the moral makeup of defendant, but he was not allowed to fully give it. The Court of Appeals also held that the answer to that letter, concededly written by defendant's counsel, was plainly inadmissible, but that even if its exclusion had been error, it was cured by the fact that the defendant, when on the stand, testified to the same explanation of his action, *i. e.*, that he understood that Aspinwall had consented that he take such of the files as he desired.

We do not think that the letter written by counsel for the defendant was inadmissible. The defendant had in substance testified that it was written by his counsel, with his consent and by his direction. In other words, that counsel was acting simply as the agent and under the direction of his principal, the defendant in the case. It was not necessary that such letter should be written by the defendant personally, in his own handwriting. The importance of the matter lies in the fact that defendant, as soon as the accusation was made, had, through his counsel, acting under his direction explained the charge made of secretly taking evidence which was in the hands of a third party, and which he feared might be used against him. The defendant did on the trial testify to the same

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explanation as contained in the letter of his counsel, *i. e.*, that Aspinwall in substance consented to the taking of the letters, but it is doubtful if such evidence cured the error of excluding the letter written at once after the accusation was made and long before the trial, in which letter he admitted and explained the taking, showing it was from no desire to suppress evidence, but, on the contrary, to preserve it.

We are of opinion, also, that the court erred in its refusal to allow defendant to testify in regard to his intention in taking the letters from the files. His counsel asked him the question when he was on the stand, after he had admitted their taking, whether he took them with the intent to suppress or destroy them, or with intent that they might be preserved and presented to the jury when his trial should come on. Counsel offered to show the fact by the witness and let the witness say which it was. This was objected to by counsel for the Government and the objection sustained.

The witness was further asked whether when he took the evidence he had the intention to destroy it. This, upon objection, was ruled out, as was the question, What did you do with these letters after you had taken them? Defendant's counsel then stated: "We offer to prove that the witness then brought them to his counsel in Washington, Mr. Worthington." The offer was, on objection, overruled.

The whole bearing of the evidence on the part of the Government in regard to the letters could only have been for the purpose of contending that the defendant took the letters without leave and intended to suppress the evidence contained in them. It was proper to prove the intent of the witness when he took these letters, whether he took them with the intent of destroying or suppressing them as evidence against himself, or whether he took them for the purpose of preservation and of delivering them to his counsel to be used on his trial. It was error to reject the evidence, for it was material and proper to go to the jury. The Court of Appeals so held, and said: "The intent of the defendant in obtaining possession of

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the letters was material, and being material the defendant should have been permitted to testify as to his intent and motive." The court, however, Mr. Chief Justice Shepard dissenting, held that the record showed that this error, in excluding material evidence, did not harm the defendant, and should, therefore, be disregarded by the appellate court.

There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for the reversal of the judgment. *Deery* v. *Cray*, 5 Wall. 795, 807; *Smiths* v. *Shoemaker*, 17 Wall. 630.

The defendant was peculiarly situated in this case, and great care was necessary to prevent injustice to him. The record shows that one of the alleged conspirators, Machen, had just prior to defendant's trial herein pleaded guilty under this same indictment and had been sentenced to imprisonment, to commence upon the expiration of a term of imprisonment he was then serving. He was not called as a witness. While this action of Machen was not the slightest evidence of the guilt of defendant, and was not matter to be referred to or considered by the jury, it left defendant without the aid of Machen in the trial of the case. In addition to that, Lorenz was called as a witness for the Government upon the trial of this defendant, and testified that he was a defendant in the two conspiracy indictments in regard to which this defendant was then on trial, and that he was then serving in the Moundsville Penitentiary a sentence from the Supreme Court of the District. Both of these men might have been guilty of a conspiracy to defraud the United States, and the defendant be innocent thereof. But a felon, being also a confessed accomplice, was thus produced by the Government as a witness for the purpose of proving its case against defendant, the witness having, as it would appear, in popular language, turned "State's evidence,"

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at least so far as to incriminate himself together with defendant. Without his evidence it would have been difficult, if not impossible, to convict the defendant. No reflection is intended or intimated with regard to this action on the part of the Government. It was wholly within the discretion of its law officers, and their decision ought not to be reviewed by the court. But the evidence of a witness, situated as was Lorenz, is not to be taken as that of an ordinary witness, of good character, in a case whose testimony is generally and *prima facie* supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. In many jurisdictions such a man is an incompetent witness unless he has been pardoned. The facts surrounding this case make it particularly important that the rule in regard to material errors should be most rigidly adhered to. If it be not clear that no harm could have resulted from the commission of this material error, the judgment should be reversed. A careful perusal of the testimony, regarded by the court below as sufficient to show that no harm resulted to the defendant on account of this error, has failed to convince us that such is the fact. In the opinion of the Court of Appeals it is said there was no testimony given as to the intent with which defendant took the letters. This was, of course, because such evidence was excluded. The letters were, in fact, subsequently produced by defendant's counsel in court. It is further said, in the opinion, that the defendant was "permitted to testify as to his reason for erasing the index number in the letterbook, and that he did so 'with the idea of putting that,' *i. e.*, the letter from the company, 'back, and making the file perfect.' It is therefore clear that the defendant was permitted to offer testimony, fully meeting the Government's contention that he had taken the letters without the consent of their custodian; further, that on the subject of his intent in taking them he was permitted to offer testimony

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from which the only possible inference was that he desired them in order that he might show everything with reference to his transactions with the Fabrikoid Company; and that as to one letter, at least, he was permitted to testify that he took it with the intention of putting it back. To have permitted him to testify, as he offered in addition to the foregoing, that he took them with the intention of showing them to his counsel, would have added little, if anything, to his explanation; indeed, as already stated, such testimony was not directly responsive to that offered by the Government, viz., that he had taken the letters surreptitiously. This latter allegation he was permitted to negative fully and explicitly. It is impossible to conclude that the refusal of the learned trial justice to permit him to testify more fully as to what he intended to do with the letters was prejudicial to his defense."

There may have been testimony some time during the trial, from which inferences might possibly have been drawn as to the motive or intent with which those letters were taken, but, instead of testimony from which such inferences might have been drawn, the defendant was entitled to state directly on oath to the jury what that intention was, and what were the motives which induced him to take the letters.

It is hardly possible to imagine a case where greater care was necessary in regard to the exclusion of proper and admissible evidence than in the case before us. As we have said, it was entirely possible that the jury might believe that both Lorenz and Machen were guilty, as alleged, in the indictment for conspiracy, and that the defendant was, nevertheless, perfectly innocent. No material and proper evidence upon that issue should have been excluded, and the error committed was not, in our opinion, clearly shown to have been harmless.

During the trial, while the case was with the defense, counsel offered in evidence a certain book, which contained entries relating to the financial transactions between defendant and Lorenz, in connection with the contract, dated June 25, 1902, between the lock company and the Post Office Department.

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As part of its case, the Government had been permitted to introduce evidence tending to show that Lorenz had paid to defendant some part of the money which Lorenz had received from the lock company, and evidence was given which the Government claimed tended to show that the receipt of these moneys by defendant was concealed from his company.

Spencer Trask had been called by the Government as a witness for the purpose of showing his ignorance of any such payments, and he was asked whether the defendant had ever told him that under this contract with the Government he was to receive a part of the money back from Lorenz, and the witness answered, "Certainly not; absolutely not." It appeared that the witness Trask was a banker in the city of New York, and that he held a controlling interest in the lock company, of which Mr. Chance, his private secretary, was president. He also testified that he did not care to and did not, as a matter of fact, spend time in the examination of the details of the business of the lock company; that he confided it to Mr. Chance and the defendant, and that the president, Mr. Chance, by direction of witness, had the general conduct of the company under his control.

The question whether the defendant had received money back from Lorenz, of which he gave no account to and concealed from the lock company, was strongly contested upon the trial, and evidence given on the part of the Government, which it claimed tended to prove the concealment. The defendant, on the contrary, contended that these moneys, which he did not deny that he had received, were paid to him by Lorenz for services which defendant had performed for him and which moneys were known by Mr. Chance to have been paid and that he had, as president of the company, approved of such payments. It was further contended that Mr. Chance had seen the book in which the defendant had entered the fact and the dates of such receipts of money from Lorenz, and that the book had been given to Mr. Chance for the purpose of examination by him in his capacity as president; that Mr. Chance

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had taken the book and had looked through it, and checked in lead pencil marks, in evidence of his approval, the various items, among which were the items showing the receipt of the moneys from Lorenz by defendant. The witness testified that such book, then offered in evidence by his counsel, was in the same condition when offered in evidence as it was when it was received back by him from Mr. Chance after his examination and approval of its entries.

The receipt of the book in evidence was objected to by counsel for the Government, and excluded by the court. "What is there," inquired the court, "to show that this book has not been altered since he made the entries" (meaning the defendant)? And again the court said: "I am very seriously in doubt as to whether you are entitled to have the book in evidence on the ground claimed for it, that is, that it was submitted to Chance; and on account of the condition of the book I will resolve that doubt against you." We do not see there was anything in the condition of the book (which was produced on the argument before us) that would prevent its being received in evidence.

We think the court erred in the exclusion of the book. It was not offered as an ordinary account book, showing accounts between different parties, but it was offered as a written corroboration of the evidence of the defendant when he testified that the receipt of the moneys by him from Lorenz was known by the company, and was not concealed from it by him, but, on the contrary, was put into a book which the president of the company saw, and which he checked as approved. It is true that the integrity of the items in the book depends upon the evidence of the defendant. He might have made all of them after this question arose. He might have so made the entries as to the receipt of the moneys from Lorenz. He might have forged the check marks alleged to have been made by Mr. Chance, but he testified that such was not the case; that the book was in the condition it was when he received it from Mr. Chance. We think it was competent to allow it to be shown

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to the jury, and for the jury to decide as to its worth and weight. The book was a part of the transaction testified to by the defendant.

Various other questions were urged on the argument before us, but as those already discussed require a reversal of the judgment, we do not think it necessary to notice them.

The judgment is

Reversed.

MR. JUSTICE MOODY did not take any part in the decision of this case.

SPRECKELS *v.* BROWN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 61. Submitted December 11, 1908.—Decided February 1, 1909.

Although the Supreme Court of Hawaii has not authority to enter a final judgment which is reviewable by this court when the case is before it on bill of exceptions it may do so when a writ of error has brought up the judgment. *Cotton* v. *Hawaii*, 211 U. S. 162, distinguished.

Tax returns are not conclusive as to values. Where it sufficiently appears by affidavits in the record and in this court that the value of the land involved exceeds the jurisdictional amount, the case will not be dismissed on a motion based on lower valuations in tax returns.

In Hawaii a disseisee may convey to a stranger, and a deed purporting to remise, release and forever quit claim amounts to a conveyance of all the grantor's interest in the property at the time.

While the words "sea beach" taken in a strict sense might not include a small strip outside of the metes and bounds specified in an Hawaiian deed, where by natural interpretation the grant conveyed all the upland to low water mark, and with it all accretions, this court will not reverse a ruling of the lower court to that effect.

In a deed to property in Hawaii monuments shown in a diagram held to prevail, in case of discrepancy, over metes and bounds.

The party having the burden of proof is not entitled to a reversal because the jury was charged to find against him unless satisfied that

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he had clearly proved his case even though the word "clearly" be slightly overemphasized. *Ward* v. *Cochran*, 150 U. S. 597.

Where articles indicating the judge's leanings appear in a newspaper, and one of the parties informs the judge that he need not give any instructions to the jury as to reading the paper, the verdict cannot be set aside because similar articles subsequently appeared in other papers which may have been read by members of the jury.

The admission of affidavits of jurymen to effect that they had not been influenced by newspaper articles held to be immaterial, the order overruling the motion for new trial being right on other grounds.

18 Hawaii, 91, affirmed.

THE facts are stated in the opinion.

Mr. Mason F. Prosser and *Mr. Robbins B. Anderson* for plaintiffs in error.

Mr. Charles A. Brown, defendant in error, *pro se*.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of ejectment brought by the defendant in error, Brown. He had a verdict and judgment, subject to exceptions. These were taken to the Supreme Court of Hawaii by writ of error, the Supreme Court overruled the exceptions and affirmed the judgment below, and the case then was brought to this court. A motion to dismiss was made, on the grounds that the Supreme Court had no authority to enter final judgment, that it does not appear that the property in question is worth five thousand dollars, and that the plaintiffs in error are estopped to say that it has that value by their tax returns, under oath, valuing it at a less amount. This motion can be disposed of in a few words. For the first ground, *Meheula* v. *Pioneer Mill Co.*, 17 Hawaii, 91, is relied upon. See also *Cotton* v. *Hawaii*, 211 U. S. 162; *Hutchins* v. *Bierce*, 211 U. S. 429. But those cases deal with proceedings upon a bill of exceptions alone. Here there was a writ of error, which, as the Supreme Court of Hawaii pointed out in the decision cited, brings up the judgment. As to the value of the land in dispute,

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it sufficiently appears by affidavits in the record and in this court, in which also there is an attempt to explain the low valuation in the tax returns. *Red River Cattle Co.* v. *Needham*, 137 U. S. 632, 635, 636. The tax returns in any event are not conclusive. *Willcox* v. *Consolidated Gas Co.*, *ante*, p. 19. Therefore the motion to dismiss is overruled.

The suit is for two parcels of land, mostly accretions, on the ocean side of Front street, Hilo, in Hawaii. The plaintiffs in error are admitted to own the upland on the other side of the street. For the first question raised upon the merits it is enough to say that, subject to other questions to be discussed, these parcels formerly belonged to Benjamin Pitman, together with the upland; that after conveyance by him of the latter, they passed to his wife by devise, and that she, while disseised, executed a deed purporting to "remise, release and forever quit claim" to the defendant in error, Brown, a stranger, "all (her) right, title and interest in and to" the premises. The plaintiffs in error contend, and asked rulings to that effect, that a deed in that form by a disseisee to a stranger is void. We should be very slow to import into Hawaii a purely historical and uselessly technical reminiscence, when the courts of the Territory say that their usage has neglected it. Here as there the words quoted carry, even to professional minds, the notion of conveyance, as fully as the words give and grant. They suggest a possible infirmity of title, or an unwillingness of the grantee to take risks, but they are not limited in popular understanding to a release to a party already in. They hardly ever suggest that idea. Especially where as here the conveyance is upon a substantial consideration ($5,000), it ought to be upheld; as it would be upheld in a jurisdiction which has furnished its share of precedents to Hawaii.

In Massachusetts the principle that a deed of quitclaim and release is sufficient to pass all the estate that the grantee could convey by a deed of bargain and sale early was established by judicial decision. *Pray* v. *Pierce*, 7 Massachusetts, 381; *Russell* v. *Coffin*, 8 Pick. 143, 153; *Freeman* v. *McGaw*, 15 Pick. 82,

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86, 87. See *Moelle* v. *Sherwood*, 148 U. S. 21, 28. And this principle was embodied in the first revision of the statutes, the section having been inserted by the Commissioners "to remove all doubts as to a mode of conveyance, which long has prevailed throughout the Commonwealth; and to which there is no objection, but what is merely technical and formal." Rev. Stats. of Mass., 1836, p. 405, c. 59, § 5, and Commissioners' Notes. Rev. Laws of Mass., 1902, p. 1222, c. 127, § 2. (It appears, in his handwriting, that this note was written by Judge Jackson, who was especially learned in real property law.) The principle is carried so far that a release of the grantor's right, title and interest is held sufficient to bar an entail and remainders expectant thereon, *Allen* v. *Ashley School Fund*, 102 Massachusetts, 262, 265; *Coombs* v. *Anderson*, 138 Massachusetts, 376, 378, under a statute allowing it to be done by a deed in common form, Gen. Stat., c. 89, § 4, Pub. Stat. of 1882, c. 120, § 5, p. 732, Rev. Law, c. 127, § 24, although the obvious and established construction of the words "my right, title and interest" confines them to the estate actually owned at the time. *Allen* v. *Holton*, 20 Pick. 458. The right of a disseisee to convey is a different question from the one we have been discussing, but that is not disputed, and in Hawaii seems to be established by law.

It will be remembered that the land in controversy consists of two parcels on the ocean side of Front street. One, called the Bates land, lies between the lines of King street and Waianuenue street extended, these streets being at right angles with Front street; and one called the Kalaeloa land, lies on the further side of King street. The court instructed the jury that the plaintiff had made out a complete paper title to these two lots. This ruling is challenged on several grounds. The Bates land is supposed to have come to Pitman through mesne conveyances from a grant from King Kamehameha III to Elizabeth G. I. Bates. This conveyed the upland above Front street down to what then was its upper side, "and also the sea beach in front of the same down to low-water mark." As the case

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comes to us the facts appear but imperfectly, but it would seem that if the words "the sea beach" be taken in a very strict sense, there would have been a strip not conveyed, between the front lines of the upland as described by metes and bounds and the beach, that is, high-water mark; in which case the accretions now in question would not belong to the plaintiff. This is the first ground of challenge. But it would be impossible, on this record, for us to say that the ruling was wrong, and we see no reason whatever to doubt that it was right. The natural interpretation is that the King conveyed the upland and all in front of it to low-water mark. The matter was discussed very fully by the Supreme Court. It said that the area between the part described and high-water mark was not very extensive, was of little value, and was closely connected with the upper part in use. We gather that if the evidence were before us we should be confirmed in our opinion that on this point the ruling was right.

The other land is claimed under a Land Commission award and royal patent to Kalaeloa. The latter, as translated from Hawaiian, bounded the land "Beginning at the west corner of this, adjoining the edge of the street (King street) along the edge of the sea," with a description by courses and distances and area. There was also a diagram enclosing the upland in heavy lines, and extending the sides by dotted lines across a space marked Beach to the edge of the sea. It is said that the measurements go only to the street, although the defendant in error affirms that the area would include the beach. We see no reason why the monuments should not prevail, as usual, if there is a discrepancy as alleged.

Kalaeloa conveyed to Pitman. The deed is not in the record, but it was assigned as error that the court instructed the jury that the words "with the right of extension to low-water mark" covered the lot in question. If anything is open on this assignment, we are of opinion that the ruling was right. We may add at this point that it is not argued here that the conveyances by Pitman under which the plaintiffs in error

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claim carried the land on the ocean side of Front street. That remained in Pitman and passed by his devise to his wife.

The plaintiffs in error contend that the trial court erred in its instructions to the jury with regard to the apportionment of accretions. The evidence is not before us, and they rely simply on a statement in the opinion of the Supreme Court. As that court said, they did not claim the portion concerned, and were trying to set aside the verdict on the weakness of the plaintiff's title alone. The Supreme Court was of opinion that the instructions were wrong but that, so far as appeared, the verdict was right, and declined to set it aside or to require a remittitur as a condition of not doing so. It does not appear that there was error in this course.

The plaintiffs in error set up the defense of adverse possession. They admit that the burden was upon them to prove it, but assign as error that the jury was instructed to find against them, unless satisfied by a preponderance of evidence that they had "clearly" proved it. The slight over-emphasis in the word "clearly," if it was such, is not a sufficient ground for disturbing the verdict. See *Ward* v. *Cochran*, 150 U. S. 597, 606.

The final assignments of error are for the refusal to grant a new trial. It seems that after a long trial the plaintiff (defendant in error) moved the court to direct a verdict. In the absence of the jury the judge stated that he was inclined in favor of the plaintiff, but did not want to grant the motion, as there was still some doubt in his mind. He added that should the jury render a verdict for the defendant, and should a motion be made to set it aside, he might do so. He made these remarks, supposing that no reporter was present, but they were printed in the evening paper, with a heading "Favors the Plaintiff." This was called to the attention of the judge, and he was proceeding to instruct the jury not to read the papers of that evening or the next morning, when the counsel for the defendants said: "Your honor, I presume, refers to the article in the Evening Bulletin. We do not ask for such an order.

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Let the jurors read the papers, we will take our chances." In the morning, in consequence of an imputation, there was some inquiry into the responsibility for the article, proof that the plaintiff had nothing to do with it, and mutual apologies. The judge instructed the jury that whatever remarks were made by the court were made without having heard counsel, and were not intended to influence the jury, and pointed out that the jury were the judges of the facts. In short, every effort was made by all concerned to have the jury disregard the whole matter. The morning paper, however, reprinted a part of the article, with a heading "Judge De Bolt leans to plaintiff," etc., and stated that in reply to the reporter the judge said that he did make such an intimation of his views, that he did it to save time in arguing the motion, but was not aware that any member of the press was present. One ground of the motion for a new trial was that these papers were read by several of the jurors before the case was submitted to them, and afterwards were read aloud in the jury room.

It appears to us that the motion could not have been granted on the facts as we have stated them, following the statement of the trial judge. In the first place, the remarks, although they indicated a present leaning, disclosed a present doubt, and by no means promised that a verdict for the defendants would be set aside. They meant little or nothing more than that by refusing to direct a verdict the judge did not preclude another application by the plaintiff if he should not prevail. The morning papers added nothing substantial to the article of the evening before. The evening article purported to report the words, the morning one to give a verification of their having been spoken. But there was no reasonable doubt of the truth of the first report, and the truth was assumed in what was said to the jury on the matter. The waiver by the counsel of the defendants, although there are some slight differences in the reports of it, was understood to be, and is found to have been, in general terms, and to have applied to any other papers as well as the Evening Bulletin. It would be most unjust to

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interpret it otherwise now. The defendants said they would take their chances at a time when there were several ways in which the jury could have been prevented from seeing the papers or seeing them further. They stopped the court from even giving the jury instructions. It is too late now to complain.

It is objected that the judge erred in admitting affidavits of the jurymen that they were not influenced by the reading of the article. *Mattox* v. *United States*, 146 U. S. 140. This error is immaterial, as the order overruling the new trial was right on other grounds.

Judgment affirmed.

THE STANDARD OIL COMPANY v. ANDERSON.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 58. Argued January 7, 1909.—Decided February 1, 1909.

One in the general service of another may be so transferred to the service of a third person as to become the latter's servant with all the legal consequences of the new relation; but to change the relation and relieve the master requires more than the mere fact that the servant is sent to do work pointed out by such third party who has made a bargain with the master for his services.

A winchman employed by the person furnishing the hoisting power to a master stevedore for loading a vessel, held to remain that person's servant notwithstanding the hoisting signals were given by the stevedore's foreman and not to be a fellow servant of an employé of the stevedore who was injured by his negligence.

152 Fed. Rep. 166, affirmed.

THE facts are stated in the opinion.

Mr. Charles W. Fuller for petitioner:

The defendant and the negligent winchman did not sustain

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to each other the relation of master and servant in such a sense that the defendant is liable for the winchman's negligence within the doctrine of *respondeat superior*. Hereunder, cases in which it is held that where a servant who is in the general employment of one person enters the particular or special employment of another, he becomes the servant of the special master, with relation to the particular service, and, therefore, the fellow-servant of the other employés of the special master, are in point, for the reason that they show that in such a case a servant who is thus transferred from the general employment of one person to the particular employment of another becomes, for the time being, the servant of the special master. Therefore cases of this character are cited along with the cases which involve only the application of the *respondeat superior* doctrine. See *The Harold*, 21 Fed. Rep. 428; *Lonergan* v. *The Island*, 28 Fed. Rep. 478; *The Elton*, 142 Fed. Rep. 367; *Brady* v. *Chicago &c. Ry. Co.*, 114 Fed. Rep. 100; *Sargent Co.* v. *Baublis*, 215 Illinois, 428; *Murray* v. *Currie* (1870), L. R. 6 C. P. 24; *Rourke* v. *White Moss Colliery Co.* (1876), 2 C. P. Div. 205; *S. C.*, 46 L. J. C. P. 283, affirming 1 C. P. Div. 556; *Jones* v. *Scullard* (1898), 2 Q. B. 565; *Donovan* v. *Laing &c. Construction Syndicate* (1893), 1 Q. B. 629.

In the state courts, there are decisions to the effect that the power of the special master to direct and control the servant is regarded as the decisive factor. The rule applied in these cases is that when one person lends or hires a servant to another for a particular employment, the servant for anything done in the particular employment must be dealt with as the servant of the man to whom he is lent or hired, although he remains the general servant of the person who lent or hired him. *Parkhurst* v. *Swift*, 31 Ind. App. 521; *Kimball* v. *Cushman*, 103 Massachusetts, 194; *S. C.*, 4 Am. Rep. 528; *Johnson* v. *Boston*, 118 Massachusetts, 114; *Clapp* v. *Kemp*, 122 Massachusetts, 481; *Ward* v. *New England Fibre Co.*, 154 Massachusetts, 419; *Hasty* v. *Sears*, 157 Massachusetts, 123; *S. C.*, 34 Am. St. Rep. 267; *Morgan* v. *Smith*, 159 Massachusetts, 570;

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Reagan v. *Casey*, 160 Massachusetts, 374; *Geary* v. *Stevenson*, 169 Massachusetts, 23; *Haskell* v. *Boston Dist. Messenger Co.*, 190 Massachusetts, 189; *Ewan* v. *Lippincott*, 47 N. J. L. 192; *S. C.*, 54 Am. Rep. 148; *Delaware &c. R. Co.* v. *Hardy*, 59 N. J. L. 35; *S. C.*, 4 Am. & Eng. R. Cas. (N. S.) 577; 59 N. J. L. 562; *Norman* v. *Middlesex &c. Traction Co.*, 68 N. J. L. 728; *Grace &c. Co.* v. *Probst*, 208 Illinois, 147; *Consolidated Fireworks Co.* v. *Koehl*, 190 Illinois, 145; *Coughlan* v. *Cambridge*, 166 Massachusetts, 268; *Samnelian* v. *American Tool &c. Co.*, 168 Massachusetts, 12; *Delory* v. *Blodgett*, 185 Massachusetts, 126; *S. C.*, 102 Am. St. Rep. 328; *Anderson* v. *Boyer*, 156 N. Y. 93; *Higgins* v. *Western Union Tel. Co.*, 156 N. Y. 75; *Breslin* v. *Sparks*, 97 N. Y. App. Div. 69; *Baldwin* v. *Abraham*, 57 N. Y. App. Div. 67; affirmed, without opinion, 171 N. Y. 677.

Mr. Bertrand L. Pettigrew for defendant in error:

The facts show that the winchman was appointed and paid by the defendant; that he was not under the control of the contracting stevedore; that the winch which he operated as well as the dock upon which it was situated belonged to the defendant, and these facts take the case out of the rules laid down in the authorities cited by counsel for the defendant. On the general question see *Laugher* v. *Pointer*, King's Bench (1826), 5 B. & C. 547; *Quarman* v. *Burnett*, 6 M. & W. 499; *Cameron* v. *Mystrom* (1893), A. C. 308 (Privy Council); *Union Steamship Co.* v. *Claridge* (1894), A. C. 185; *St. John Gas Light Co.* v. *Hatfield*, 23 Can. Sup. Ct. Rep. 164; *Hastings* v. *LeRoy*, No. 2, 34 Can. Sup. Ct. Rep. 177.

Plaintiff in error was held liable for the negligence of its winchman in a similar case. See *Sanford* v. *Standard Oil Co.*, 118 N. Y. 571, which was cited and followed in *Johnson* v. *Netherlands Nav. Co.*, 132 N. Y. 576; *De Maio* v. *Standard Oil Co.*, 68 App. Div. 167; *Lauro* v. *Standard Oil Co.*, 74 App. Div. 4. See also *The Lisnacrieve*, 87 Fed. Rep. 570, and cases cited; *The Slingsby*, 116 Fed. Rep. 227; *The Gladestry*, 128 Fed. Rep. 591; *Otis Steel Co.* v. *Wingle*, 152 Fed. Rep. 914.

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MR. JUSTICE MOODY delivered the opinion of the court.

The respondent, hereafter called the plaintiff, brought an action in the Circuit Court of the United States for the Eastern District of New York to recover damages for personal injuries alleged to have been suffered by him through the negligence of a servant of the petitioner, hereafter called the defendant.

The plaintiff was employed as a longshoreman by one Torrence, a master stevedore, who, under contract with the defendant, was engaged in loading the ship Susquehanna with oil. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a draft or load of cases containing oil, which was unexpectedly lowered. The ship was alongside a dock belonging to the defendant, and the cases of oil were conveyed from the dock to the hatch by hoisting them from the dock to a point over the hatch, whence they were lowered and guided into the hold. The work was done with great rapidity. The motive power was furnished by a steam winch and drum, and the hoisting and lowering were accomplished by means of a tackle, guy rope and hoisting rope. The tackle and ropes were furnished and rigged by the stevedore, and the winch and drum were owned by the defendant and placed on its dock, some fifty feet distant from the hatch. All the work of loading was done by employés of the stevedore, except the operation of the winch, which was done by a winchman in the general employ of the defendant. The case was tried before a jury and the plaintiff had a verdict. The verdict establishes that the plaintiff was in the use of due care and that his injuries were suffered by reason of the negligence of the winchman in improperly lowering the draft of cases into the hold.

The only question presented is, whether the winchman was, at the time the injuries were received, the servant of the defendant or of the stevedore. If he was the servant of the defendant, as he was found to be by the courts below, the defendant was responsible for his negligence. If not, that is the

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end of the case, and it is not necessary to inquire what would be the measure of liability of the stevedore.

The decision of this question requires us to consider some further facts which were not disputed. The winchman was hired and paid by the defendant, who alone had the right to discharge him. The stevedore agreed to pay the defendant $1.50 a thousand for the hoisting. The stevedore had no control over the movements and conduct of the winchman, except as follows: The hours of labor of the winchman necessarily conformed to the hours of labor of the longshoremen. The winch and winchmen were at a place where it was impossible to determine the proper time for hoisting and lowering the draft of cases of oil, and the winchman necessarily depended upon signals from others. These signals were given by an employé of the stevedore, called a gangman, who stood upon the deck of the ship and gave signals to hoist or lower by the blowing of a whistle which could be heard for a long distance. The negligence consisted in lowering a draft of cases before receiving this signal.

This case is here by certiorari from the Circuit Court of Appeals, which affirmed the judgment of the Circuit Court, because of the supposed conflict of decision in the lower Federal courts. Upon a state of facts, much resembling each other, it was held by the Circuit Court of Appeals for the Second Circuit, in *The Slingsby*, 120 Fed. Rep. 748, that the winchman was the servant of him who furnished the winch and power, and in *The Elton*, 142 Fed. Rep. 367, the contrary conclusion was reached by the Circuit Court of Appeals for the Third Circuit. In the latter case, it is true, the judgment was rested upon a question of pleading, and the observations of the court upon this subject were unnecessary to the decision. It is by no means certain that both cases do not differ materially from the case at bar as we view it, and we do not deem it necessary to question the conclusions reached in them.

We have examined the authorities selected with discrimination, and pressed upon the attention of the court in the brief,

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compact and otherwise excellent arguments of counsel, though we do not deem it necessary to refer to all of them.

One who employs a servant to do his work is answerable to strangers for the negligent acts or omissions of the servant committed in the course of the service. The plaintiff rests his right to recover upon this rule of law which, though of comparatively modern origin, has come to be elementary. But, however clear the rule may be, its application to the infinitely varied affairs of life is not always easy, because the facts which place a given case within or without the rule cannot always be ascertained with precision. The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.

It is insisted by the defendant that the winchman, though in its general employ, had ceased to be its servant, and had become for the time being, with respect to the work negligently performed, the servant of the master stevedore. This may be true, although the winchman was selected, employed, paid and could be discharged by the defendant. If it is true, the defendant is not liable. The case, therefore, turns upon the decision of the question, Whose servant was the winchman when he was guilty of the negligence which caused the injury?

It will aid somewhat in the ascertainment of the true test for determining this question to consider the reason and extent of the rule of a master's responsibility. The reason for the rule is not clarified much by the Latin phrases in which it is sometimes clothed. They are rather restatements than explanations of the rule. The accepted reason for it is that given by

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Chief Justice Shaw in the case of *Farwell* v. *Boston & Worcester Railroad Corporation*, 4 Metcalf, 49. In substance, it is that the master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant in his negligent conduct represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. It is said in that case that this is a "great principle of social duty," adopted "from general considerations of policy and security." But whether the reasons of the rule be grounded in considerations of policy or rested upon historical tradition, there is a clear limitation to its extent. *Guy* v. *Donald*, 203 U. S. 399, 406. The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it.

It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must in-

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quire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary coöperation, where the work furnished is part of a larger undertaking.

These principles are sustained by the great weight of authority, to which some reference will now be made. The simplest case, and that which was earliest decided, was where horses and a driver were furnished by a liveryman. In such cases the hirer, though he suggests the course of the journey and in a certain sense directs it, still does not become the master of the driver and responsible for his negligence, unless he specifically directs or brings about the negligent act. *Quarman* v. *Burnett*, 6 M. & W. 499; *Jones* v. *Mayor &c.*, 14 Q. B. D. 890; *Little* v. *Hackett*, 116 U. S. 366. Though even in such cases, if the exclusive control over the driver be in the hirer, he may be responsible as master. *Jones* v. *Scullard*, 2 Q. B. (1898) 565.

In the case of *Murray* v. *Currie*, L. R. 6 C. P. 24, these facts appeared: The defendant was the owner of a ship which was provided with a winch, worked by a donkey engine, which was used for loading and unloading the cargo. He engaged a master stevedore to do the work of unloading the vessel, and agreed to supply him with the winch, the power and such sailors as the stevedore might need, deducting the amount of their wages from the agreed compensation for unloading. The stevedore selected the work for the sailors to do and had control over it and direction over the men. One of the sailors while operating the winch conducted himself so negligently that the plaintiff, who was in the employ of the stevedore, was injured, and brought this action against the defendant to recover damages, alleging that the winchman was the servant of the defendant. It was held that the winchman at the time was not the servant of the defendant but of the stevedore;

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Bovill, C. J., saying: "The work of unloading was done by Kennedy (the stevedore) under a special contract. He was acting on his own behalf, and did not in any sense stand in the relation of servant to the defendant. He had entire control over the work, and employed such persons as he thought proper to act under him. He had the option of using the services of the crew of the ship; but he was under no obligation to do so. Whether he selected independent laborers or part of the crew, they were all his servants, and their acts were his acts, and not the acts of the owner. . . . Davis (the winchman) was employed in this way by the stevedore, and was doing his work, and under his control and superintendence." Willes, J., added: "The question here is, whether Davis, who caused the accident, was employed at the time in doing Kennedy's work or the shipowner's. . . . The liability of a master for the acts of his servant extends only to such acts of the servant as are done by him in the course of the master's service. The master is not liable for acts done by the servant out of the scope of his duty, even though the master may have entered into a bargain that his servant should be employed by another, and is paid for such service, as was done here." Brett, J., added: "But I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor."

The case of *Rourke* v. *The White Moss Colliery Co.*, L. R. (1876) 2 C. P. D. 205, frequently has been cited and approved by American courts. The defendant in that case was the owner of a colliery and had employed, for an agreed price, a contractor to sink a shaft. It was stipulated as part of the agreement that the defendant should provide the contractor with power, ropes and an engineer to work the engine; but with the distinct understanding that the engineer and the en-

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gine should be under the control of the contractor. The engineer operated the engine so negligently that he caused injuries to the plaintiff, a servant of the contractor, who brought this action against the defendant to recover damages for his injuries, alleging that the engineer was the servant of the defendant. It was held that the engineer was not the servant of the defendant, but, for the time being, was the servant of the contractor. Cockburn, C. J., after remarking that the engineer, through whose fault the injury occurred, was undoubtedly the general servant of the defendant, said: "But these circumstances afford no ground, in point of law, for visiting the defendants with the result of the man's negligence, if he was not, in point of fact, their servant at the time, in the sense of being actually employed to do their work." He then proceeds to say that if the defendants had undertaken thus to do the work of hoisting by their machinery and servants, then they would have been liable, "for in that case Lawrence, the engineman, would have continued to be the servant of the company, and would have been working as their servant at their work." And see *Donovan* v. *Laing*, L. R. (1893) 1 Q. B. D. 189, 629, and *Union Steamship Company* v. *Claridge*, Appeal Cases, 1894, p. 185.

The two cases which have just been reviewed are much relied upon by the defendant, and for that reason have been fully stated. It should be observed that in each of them it clearly appeared in point of fact that the general servant of the respective defendants had ceased for the time being to be their servants, and had passed under the direction and control of another person, upon whose work they were engaged.

In the case of *Higgins* v. *Western Union Telegraph Co.*, 156 N. Y. 75, where a similar question was under consideration, O'Brien, J., thus expressed the principle: "The question is whether, at the time of the accident, he was engaged in doing the defendant's work or the work of the contractor. . . . The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct."

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In many cases this test has been followed. Among them are *Parkhurst* v. *Swift*, 31 Ind. App. 521; *Kilroy* v. *Canal Co.*, 121 N. Y. 22; *Wyllie* v. *Palmer*, 137 N. Y. 248; *Anderson* v. *Boyer*, 156 N. Y. 93; *Murray* v. *Dwight*, 161 N. Y. 301; *Delaware &c. R. Co.* v. *Hardy*, 59 N. J. L. 35; *Consolidated Fireworks Co.* v. *Koehl*, 190 Illinois, 145; *Grace &c. Co.* v. *Probst*, 208 Illinois, 147; *Kimball* v. *Cushman*, 103 Massachusetts, 194; *Johnson* v. *Boston*, 118 Massachusetts, 114; *Delory* v. *Blodgett*, 185 Massachusetts, 126; *The Elton*, *supra*.

In many of the cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control.

Let the facts in evidence now be considered in the light of the foregoing principles of law. Was the winchman at the time he negligently failed to observe the signals engaged in the work of the master stevedore, under his rightful control, or was he rather engaged in the work of the defendant, under its rightful control? We think that the latter was the true situation. The winchman was, undoubtedly, in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct or any other reason. In order to relieve the defendant from the results of the legal relation of master and servant it must appear that that relation, for the time, had been suspended and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum and the winchman were its own. It did not furnish them but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, under its own control.

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Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be coöperation and coördination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed coöperation rather than subordination, and is not enough to show that there has been a change of masters. The case of *Driscoll* v. *Towle*, 181 Massachusetts, 416, is in point here. In that case the defendant was engaged in a general teaming business. He furnished a horse, wagon and driver to the Boston Electric Light Company. The driver reported to the electric light company and received directions as to what to do and where to go from an employé of that company, but at night returned the horse and wagon to the defendant's stable and received pay from the defendant. While traveling to carry out an order received from the company he negligently injured the plaintiff, who brought an action to recover for the injuries, alleging that the driver was the defendant's servant. It was held that there was evidence which would warrant the jury in finding that the driver continued to be the defendant's servant. It was said in the opinion of the court, delivered by Holmes, C. J. (now Mr. Justice Holmes):

"But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant more than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign,—as the master sometimes was called in the old books.

"In this case the contract between the defendant and the electric light company was not stated in terms, but it fairly could have been found to have been an ordinary contract by

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the defendant to do his regular business by his servants in the common way. In all probability it was nothing more. Of course in such cases the party who employs the contractor indicates the work to be done and in that sense controls the servant, as he would control the contractor, if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master has undertaken to do. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act."

We think that the courts below correctly held that the winchman remained the servant of the defendant. Upon facts not differing in principle from those before us, the same conclusion was reached in *Sanford* v. *Standard Oil Co.*, 118 N. Y. 571; *Johnson* v. *Netherlands &c. Co.*, 132 N. Y. 576; *The Victoria*, 69 Fed. Rep. 160; *The Lisnacrieve*, 87 Fed. Rep. 570; *McGough* v. *Ropner*, 87 Fed. Rep. 534; *The Gladestry*, 128 Fed. Rep. 591; *The City of San Antonio*, 143 Fed. Rep. 955.

Judgment affirmed.

CONTINENTAL WALL PAPER COMPANY *v.* LOUIS VOIGHT AND SONS COMPANY.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 15. Argued April 24, 27, 1908.—Decided February 1, 1909.

Where a number of manufacturers situated in different States engaged in manufacturing an article sold in different States, organize a selling company through which their entire output is sold, in accordance with an agreement between themselves, to such persons only as enter into a purchasing agreement by which their sales are restricted, the effect

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is to restrain and monopolize interstate and foreign trade and commerce and is illegal under the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209; and so held in regard to a combination of wall paper manufacturers.

While a voluntary purchaser of goods at stipulated prices under a collateral, independent contract cannot avoid payment merely on the ground that the vendor was an illegal combination, *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, a vendee of goods purchased from an illegal combination in pursuance of an illegal agreement can plead such illegality as a defense.

The court cannot lend its aid in any way to a party seeking to realize the fruits of an illegal contract, and, while this may at times result in relieving a purchaser from paying for what he has had, public policy demands that the court deny its aid to carry out illegal contracts without regard to individual interests, or knowledge of the parties.

The refusal of judicial aid to enforce illegal contracts tends to reduce such transactions.

In determining whether a contract amounts to a combination in restraint of interstate trade in violation of the act of July 2, 1890, all the facts and circumstances will be considered. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 247.

148 Fed. Rep. 939, affirmed.

THE facts appear in the statement of MR. JUSTICE HARLAN.

Mr. Louis Marshall, with whom *Mr. Joseph Wilby* was on the brief, for petitioner:

Assuming, but not conceding, that the organization of the plaintiff was for the purpose of restraining competition, and enhancing prices, the defendants have no defense, under common-law considerations, to the action brought against them to recover for goods sold and delivered.

The illegality of the acts of plaintiff, even if proved, do not absolve the defendants from the legal obligation to pay for goods admittedly bought by them. "A person does not become an outlaw and lose all rights by doing an illegal act." *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 425.

This case is governed by the decision of this court in the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, and

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cases there cited. See also, to the same effect, the following: *Edison Electric Light Co.* v. *Sawyer-Man Electric Co.*, 53 Fed. Rep. 598; *American Soda Fountain Co.* v. *Green*, 69 Fed. Rep. 333; *Brown Saddle Co.* v. *Troxel*, 98 Fed. Rep. 620; *National Folding Box and Paper Co.* v. *Robertson*, 99 Fed. Rep. 985; *Otis Elevator Co.* v. *Geiger*, 107 Fed. Rep. 131; *Ocean Ins. Co.* v. *Polleys*, 13 Peters, 164; *Armstrong* v. *American Exchange Bank*, 133 U. S. 467; *Buchanan* v. *Drovers' National Bank*, 55 Fed. Rep. 226; *Morris* v. *Norton*, 75 Fed. Rep. 926; *Phalen* v. *Clark*, 19 Connecticut, 432; *The Charles E. Wisewall*, 86 Fed. Rep. 674; *Phenix Ins. Co.* v. *Clay*, 101 Georgia, 332; *Erb* v. *Insurance Co.*, 98 Iowa, 611; *Niagara Ins. Co.* v. *De Graff*, 12 Michigan, 136; *Tracy* v. *Talmage*, 14 N. Y. 175; *Curtis* v. *Leavitt*, 15 N. Y. 245; *Mandelbaum* v. *Greyovich*, 17 Nevada, 95; *Planters' Bank* v. *Union Bank*, 16 Wall. 500; *Yarborough's Admr.* v. *Avant*, 66 Alabama, 526; *Ware* v. *Curry*, 67 Alabama, 274; *Martin* v. *Hodge*, 47 Arkansas, 378; *National Distilling Co.* v. *Cream City Importing Co.*, 86 Wisconsin, 352; *Minnesota Lumber Co.* v. *Whitebreast Coal Co.*, 56 Ill. App. 248; *Congress Co.* v. *Knowlton*, 103 U. S. 49; *Welch* v. *Wasson*, 6 Gray, 506; *Levin* v. *Chicago Gas Light & Coke Co.*, 64 Ill. App. 393; *Ingraham* v. *National Salt Co.*, 130 Fed. Rep. 676.

Again, assuming that the plaintiff was a trust, and that it could have been lawfully proceeded against, under the act of Congress of July 2, 1900, yet that fact does not prevent the plaintiff from recovering for the goods which it sold and delivered to the defendants.

While the statute declares a trust, or combination, such as the plaintiff is claimed to be, illegal, and subjects every person entering into the combination to fine and imprisonment, and makes adequate provision for its annulment, yet there is nothing in the act, which permits one who purchases goods from such a trust, to despoil it of its property. The Government of the United States is sufficiently powerful to cope with an unlawful monopoly, without legalizing robbery of the char-

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acter which the defendants are seeking to perpetrate, through the aid of the courts. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *The Charles E. Wisewall*, 74 Fed. Rep. 802; affirmed, 86 Fed. Rep. 671; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 195; *Lafayette Bridge Co.* v. *City of Streator*, 105 Fed. Rep. 229; *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 185.

Even assuming, that the clause contained in the contract between the plaintiff and the defendants, which prohibited the latter from selling any of the merchandise, purchased from the former, at lower prices than those specified in the schedule annexed, was illegal, the only effect of such illegality would be, to nullify that provision, and not to prevent the plaintiff from recovering for merchandise actually received and kept by the defendants. *Pigot's Case*, 11 Coke Rep. 27*b* (1615), holding that if some conditions indorsed upon a bond, are against law, and some are good and lawful, the covenants or conditions which are against law, are void *ab initio*, and the others stand good. And see Hammon on Contracts, §§ 251 *et seq.;* Anson on Contracts (8th ed.), 206; *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. 235, 250; *United States* v. *Bradley*, 10 Pet. 343; *Hynds* v. *Hays*, 25 Indiana, 31; *Kerrison* v. *Cole*, 8 East, 231; *Gelpcke* v. *City of Dubuque*, 1 Wall. 221; *Gaskell* v. *King*, 11 East, 165; *Erie Ry. Co.* v. *Union Locomotive & Exp. Co.*, 35 N. J. L. 240; *Baines* v. *Gearey*, 35 Ch. Div. 154; *Wallis* v. *Day*, 2 Mees. & W. 273; *Haynes* v. *Doman*, L. R. (1899) 2 Ch. 13; *Oregon Navigation Co.* v. *Winsor*, 20 Wall. 64; *Western U. T. Co.* v. *Burlington & S. W. Ry. Co.*, 11 Fed. Rep. 1; *Presbury* v. *Fisher*, 18 Missouri, 50; *Moore* v. *Bonnet*, 40 California, 251; *Hanauer* v. *Gray*, 25 Arkansas, 350; *Price* v. *Green*, 16 Mees. & W. 346; *Wiley* v. *Baumgardner*, 97 Indiana, 66; *Dean* v. *Emerson*, 102 Massachusetts, 480; *Peltz* v. *Eichele*, 62 Missouri, 171; *United States* v. *Bradley*, 10 Pet. 343, 360, 364; *Trenton Potteries Co.* v. *Oliphant*, 58 N. J. Eq. 507; *S. C.*, 46 L. R. A. 255; *Thomas* v. *Miles*, 3 Ohio St. 274; *Smith's Appeal*, 113 Pa. St. 579.

The principle of these cases is directly in point here. The plaintiff agreed to sell to the defendants certain merchandise

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at an agreed price. The latter agreed to pay for the merchandise received the stipulated price, and also agreed that they would not sell such merchandise at a lesser price than that specified in the contract.

Assuming that the latter condition is void, in that event it was not binding upon the defendants; but, as has been seen, such invalidity would not absolve the defendants from liability on their covenant to pay for the merchandise delivered.

Mr. Orris P. Cobb and *Mr. Morrison R. Waite* for respondent:

Treating the matter, as it must be treated, as one general scheme, all one agreement, it plainly comes within the common-law inhibition against contracts in restraint of trade, as well as the statutes. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Montague* v. *Lowry*, 193 U. S. 38, 45; *Loewe* v. *Lawlor*, 208 U. S. 274.

The combination was an illegal trust, and an unlawful combination within the meaning of the statutes. *United States* v. *Trans-Missouri Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *Montague* v. *Lowry*, 193 U. S. 38; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129; *United States* v. *Jellico C. & C. Co.*, 46 Fed. Rep. 432; *American Biscuit Co.* v. *Klotz*, 44 Fed. Rep. 721; *Oliver* v. *Gilmore*, 52 Fed. Rep. 562; *C., M. & St. P. R. Co.* v. *Wabash &c. R. R. Co.*, 61 Fed. Rep. 993, 997; *National Harrow Co.* v. *Hench*, 83 Fed. Rep. 36, 38; *S. C.*, 84 Fed. Rep. 226; *United States* v. *Coal Dealers' Assn.*, 85 Fed. Rep. 252; *Cravens* v. *Carter-Crume Co.*, 92 Fed. Rep. 479, 485; *Lowry* v. *Tile & G. Assn.*, 98 Fed. Rep. 817, 826; *S. C.*, 106 Fed. Rep. 38; *Montague* v. *Lowry*, 115 Fed. Rep. 27; *United States* v. *C. & O. Fuel Co.*, 105 Fed. Rep. 93; *C. & O. Fuel Co.* v. *United States*, 115 Fed. Rep. 610; *City of Atlanta* v. *Chattanooga, F. & P. Co.*, 101 Fed. Rep. 900.

The contract between plaintiff and defendant, under which

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arises the account sued on, is a part of and directly connected with the illegal combination, and hence, unenforceable, and not merely a collateral or independent contract.

It is clear that this is not a mere case of a sale by a monopoly or a trust to a third person and that the objection raised by the defendant is not the same as that which would be raised by an outsider purchasing from a trust. *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, distinguished.

The fact that the consideration has all been executed on one side cannot alter the matter. There can be no recovery for goods sold and delivered under trust contracts, or any other contract creating an illegal monopoly in restraint of trade. See *Detroit Salt Co.* v. *National Salt Co.*, 134 Michigan, 103; *Arnot* v. *Pittston & Elmira Coal Co.*, 68 N. Y. 558; *Unckles* v. *Colgate*, 148 N. Y. 529, 538; *Clancy* v. *Onondaga Fine Salt Mfg. Co.*, 62 Barb. 395, 405–407; *Houck* v. *Brew. Assn.*, 88 Texas, 184; *Fuqua* v. *Pabst Brew. Co.*, 90 Texas, 298; *Texas Brew. Co.* v. *Templeman*, 90 Texas, 277; *Carriage Co.* v. *Hatch*, 19 Tex. Civ. App. 120.

All the statutes relied on in this case expressly forbid the making of the contracts of which the one between the plaintiff and defendant, set out in the third defense, was a material step; expressly declare the contracts void; and expressly impose a penalty upon the making of them and expressly make them criminal.

Under these statutes such transactions and such contracts are just as illegal as gambling; as contracts to assist in the smuggling of goods; as contracts to deal in futures; as contracts to make and circulate counterfeit money; as the sale of liquor in violation of law; as contracts to assist in prostitution; or in any other way to violate criminal statutes, or in furtherance of such objects.

The cases in which recovery has been denied either of the contract price when suing on the contract or on the common counts ignoring the contract, are numerous. *Ribbans* v. *Cricketi*, 1 B. & P. 264, 266; *Bensley* v. *Bignold*, 5 B. & Ald.

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335; *Marchant* v. *Evans*, 2 J. B. Moore, 14; *Gibbs* v. *Gas Co.*, 130 U. S. 396, 412; *Irwin* v. *Williar*, 110 U. S. 499; *McMullen* v. *Hoffman*, 174 U. S. 639; *Embry* v. *Jemison*, 131 U. S. 336, 348; *Miller* v. *Ammon*, 145 U. S. 421, 427; *Hanauer* v. *Doane*, 12 Wall. 342; *Sprott* v. *United States*, 20 Wall. 459; *Kohn* v. *Melcher*, 43 Fed. Rep. 641; *Peck* v. *Burr*, 10 N. Y. 294, 297; *Johnston* v. *Dahlgren*, 166 N. Y. 355, 358; *Brinkman* v. *Eisler*, 40 N. Y. St. 865, 866.

These cases show that wherever and in whatever form the question has arisen, whether for goods sold and delivered, for money loaned, services rendered, there can be no recovery on an implied contract where the express contract is illegal and the goods sold, the money loaned, or the services performed under and in pursuance of and in furtherance of an illegal contract.

MR. JUSTICE HARLAN made the following statement of facts.

The Continental Wall Paper Company, a corporation of New York brought this action against The Lewis Voight & Sons Company, a corporation of Ohio, to recover the sum of $56,762.10, as the alleged balance on an account for merchandise sold and delivered to the defendant.

The petition and answer were both amended. The amended answer contained six separate defenses, the last three of which were made counterclaims and cross-petitions. The plaintiff demurred to the second, third, fourth and fifth defenses upon the ground that neither of them stated facts sufficient to constitute a defense; and it demurred to the first and second counterclaims and cross-petitions upon the ground that they did not state facts sufficient to constitute a cause of action against the plaintiff. It also replied to the sixth defense and to the third counterclaim.

The cause was submitted in the Circuit Court on the demurrers, and the court sustained the demurrer to the second, fourth and fifth defenses and to the first and second counter-

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claims and cross-petitions, but overruled the demurrer to the third defense. The parties not desiring to plead further, it was adjudged that upon the allegations of the third defense the defendant was entitled to judgment (and judgment was entered) dismissing the petition and amended petition; and was likewise entitled to judgment (and judgment was entered) dismissing the first and second counterclaims and cross-petitions. The case was carried by the Continental Wall Paper Company to the Circuit Court of Appeals, where it was assigned for error that the Circuit Court erred in overruling the demurrer to the third defense, and in dismissing the suit. The Circuit Court of Appeals affirmed the judgment, thereby sustaining the sufficiency of that defense. The case is fully reported in 148 Fed. Rep. 939.

If the facts stated in the third defense—taking them to be true, as upon demurrer we must do—are sufficient to prevent any recovery whatever, by the plaintiff, it is not necessary to go further and consider any other questions. In view of the peculiar character of the case it is deemed just to the parties, however much it may lengthen or burden this opinion to do so, to set out that defense fully and in the words of the answer.

The third defense—the facts stated therein being admitted by the demurrer—gives the names of numerous companies and firms (more than thirty in number) which formed a combination by the name of the Continental Wall Paper Company, and also sets out the various agreements under which, it was alleged, the combination was organized to restrain and monopolize interstate commerce. The defendant corporation alleged that on the first day of July, 1898, the National Wall Paper Company was the owner of factories for the manufacture of wall paper in certain cities in New York, Pennsylvania, New Jersey and Massachusetts, and that there were like factories owned by persons and corporations in other States; that "all of said companies and firms were engaged in the manufacture of wall paper and in selling their product in the States where their said manufactories were situated, and in all the

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other States and Territories of the United States and in foreign countries, and were each and all engaged in commerce between the States and Territories and with foreign nations, and they produced and sold upwards of ninety-eight (98) per cent of all the wall paper manufactured and sold in the several States and Territories of the United States. Contriving and intending and conspiring with each other to form a combination and trust by which to limit the production of wall paper in the United States and also to enhance the price thereof to the jobbers, the wholesalers, the retailers and the consumers of wall paper, which is an article of commodity of general necessity and use among the United States and foreign countries, and, as such, was and is used and sold everywhere for the preservation, protection and decoration of buildings and dwelling houses; and, contriving and intending and conspiring with each other to unlawfully control and restrain trade and commerce between the several States and Territories of the United States, and with foreign countries, the firms and corporations hereinbefore mentioned, agreed with each other that while said corporations and persons retain the ownership of their several plants and business, and preserve and continue their separate identities and operate said several manufactories and business as before, the control of said several businesses, and all matters relating to and affecting the production of said establishments and the prices and sale of wall paper manufactured thereby, should be placed under the control of a committee to be appointed by said several corporations and firms, each to have a voice in such appointment, in proportion to the capacity of the several factories owned by them respectively; that said committee should adopt rules and regulations governing the manner of conducting the business of all said persons, firms and corporations, the hours said factories, owned by them, should be operated, the patterns of wall paper to be manufactured by them, the times when samples of the goods to be manufactured for the ensuing season should be submitted to a pricing committee, appointed by said committee, to enable it to classify and

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fix the list prices thereof; to fix and determine list prices, discounts, terms of sale, equalization of freight rates and all other matters affecting the production and regulation of prices, and the classification of the dealers in wall paper in the United States; and the prices at which wall paper should be sold to, and by such several classes; and the division of the profits, thence arising among said corporations and firms, not in proportion to their production and sales, but in proportion to their capacity; and, further, that, to secure the faithful performance by each of said persons and corporations of the provisions of said trust agreement, they should each pay a sum into a common pool, in proportion to the capacity of their respective manufactories, which said sum should be forfeited by any of said manufacturers who should break said agreement, compete with the other parties to said agreement, or sell at other or different prices than those to be fixed by said committee. . . ."

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"The National Wall Paper Company, for itself and the members of said combination, hereinbefore alleged to be represented by it, should select three (3) so-called directors of said The Continental Wall Paper Company, and said other firms and corporations should select three (3) other so-called directors of said company, which six (6) so-called directors should select a seventh (7th), who should decide all disputed matters; that said corporation and firms, calling itself, or themselves, respectively, the vendor, should sign a printed contract or agreement with said The Continental Wall Paper Company, calling itself the company, a copy of which contract or agreement is attached hereto marked 'Exhibit 1,' [which is given in the margin [1]] the said agreement being printed with blanks for

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[1] EXHIBIT 1.

An agreement, made this — day of ——— in the year one thousand eight hundred and ninety-eight, by and between ——— ——— a corporation organized under the laws of the State of ——— (hereinafter called the vendor), party of the first part, and the Continental Wall Paper

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the necessary signatures as well as numbers of shares allotted, the sum to be paid therefor and the name of the so-called vendor.

Company, organized under the laws of the State of New York (hereinafter called the company), party of the second part.

Whereas, the vendor is engaged in the manufacture and sale of wall paper, borders and other articles usually produced and handled in connection therewith, and the company is desirous of acting as its selling agent in handling the entire product of the vendor; and

Whereas, the company has an authorized capital of two hundred thousand dollars, divided into 16,000 shares, of the par value of $12.50 each; and

Whereas, the vendor is desirous of acquiring shares of the stock of said company at par, and to that end has offered to enter into this agreement and to secure the performance thereof by the deposit of said shares.

Now, therefore, in consideration of the foregoing recitals, and for other good and valuable considerations it is agreed, between the parties hereto, as follows:

First. The vendor hereby agrees to sell unto the company and the latter agrees to purchase, the entire product of wall paper that may be manufactured by the vendor for the period from July 20th, 1898, to the first day of July, 1899.

The prices at which the merchandise shall be sold to the company are set forth in a schedule hereto annexed, marked "A" and hereby made part of this agreement.

The vendor further grants unto the company the right to two renewals of said contract of one year each, provided that in the event of the election of the company to avail itself of either of said renewals it shall so signify in writing to the vendor before the first day of June next preceding the renewal term, and provided further that such election to renew shall be accompanied by the written consents of all the registered stockholders of the company, including that of the vendor.

Second. That the goods acquired by the company from the vendor hereunder which are to be sold to jobbers, shall be so sold by the company, and not by the vendor, for the account of the company. Such sale shall be made by the company at discounts from road prices fixed in the schedule hereto annexed, marked "B," which is hereby made part of this agreement. The vendor will deliver such goods upon the direction of the company, at the risk and for the account of the latter f. o. b. at the place of manufacture, provided, however, that in all cases in which the goods are manufactured at places other than the cities of New York

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"For the purposes and with the intentions aforesaid, it was further agreed that said The Continental Wall Paper Company should, in some form so as to disguise the real nature of the transaction, compel all dealers in wall paper, whether

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or Philadelphia the vendor will equalize the freights with either of said cities out of the proceeds receivable for such goods. Memorandum invoices shall be supplied to the customers and to the company immediately upon the shipment and delivery of such goods, said invoices specifying quantities and road prices.

Third. There shall be furnished by the vendor to the company, on the 7th, 14th, 21st and last days of each month (except when those days fall on Sundays, and then on the next preceding day), a just and true statement of all shipments and deliveries of merchandise included in this contract which the vendor may make for the account of the company, which statement shall contain the names of the purchasers, the character of the goods sold and the prices at which they are sold, to the end that the company may make the proper charges, and in order to entitle the vendor to be credited with the agreed cost price for such goods.

Each of such statements of shipment shall be accompanied by an affidavit of one of the officers of the vendor and one of its bookkeepers and of one of its shipping clerks, to the effect that the information contained therein is true.

Fourth. The vendor will, at the option of the company, sell for the latter such of the goods manufactured by the vendor as are to be disposed of to purchasers not classified as jobbers, which sales shall be made at the cost and expense of the vendor, said vendor hereby guaranteeing all credits connected with such sales. The prices at which and the terms upon which such goods are to be sold are designated in this agreement as the "road prices," and are contained in a schedule hereto annexed, marked "C," which is hereby made a part of this agreement.

On the 7th, 14th, 21st and last days of each month (except when those days fall on Sundays, and then on the next succeeding days) the vendor will furnish to the company a statement showing all the shipments made on account of such sales, which statement shall contain the names of the purchasers, the character of the goods and the prices at which they were sold, and such sales shall be credited to the vendor by the company at the prices fixed in schedule "A," and shall be charged against said vendor at the prices at which they were sold, which shall in no event be less than those designated in schedule "C."

The vendor is to receive for its services and expenses connected with

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jobbers or wholesalers, to sign an agreement obligating the jobbers or wholesalers to buy from no one but said members of said combination and trust, and at the prices fixed in schedule B, attached to said 'Exhibit 1,' and likewise an agreement

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such sales and allowances discounts equal to those who are designated in a classification made by the parties hereto as "second class jobbers," less the discounts made on sales to purchasers designated in the accompanying schedules as "quantity purchasers" on which the vendor has allowed the quantity discount, except that where special and exclusive goods are sold there shall be an allowance of 30 per cent discount to the vendor.

The prices of goods as fixed by schedules "A" and "C" may be altered from time to time, but the discounts allowed to jobbers shall not be altered at any time during the term of this agreement.

Fifth. The vendor will make collections of all accounts for goods sold by it for the accounts of the company under the provisions of the agreement, except for sales to jobbers (which accounts the company is to collect), and will, on the 10th of each and every month during the term of this agreement, account to the company. Such accounts shall be accompanied by a payment by the vendor to the company of the difference between the prices at which the goods are agreed to be sold to the company as embodied in schedule "A," and the prices at which the vendor has agreed to dispose of said goods as contained in schedule "C."

The purchases made by the company from the vendor hereunder shall be upon the same credit and terms as those accorded to other dealers, but the company shall have the right to anticipate the due date of all such purchases, and will pay, on the 10th day of each month, to the vendor a sum on account of all shipments of the preceding month equal to not less than 30 per cent of the road prices of goods shipped to the jobbers by the company.

Sixth. The vendor hereby grants unto the company the right, and it shall be the duty of the latter, through its officers selected for that purpose, to audit the books of accounts of the vendor at such time and in such manner as the company may, from time to time, deem necessary or proper. This provision is of the essence of the agreement, and a failure on the part of the vendor to faithfully perform the same shall operate as a breach of the contract entitling the company to abrogate the agreement and to such damages as it may be able to establish in addition to the absolute transfer and surrender to it of the stock to be pledged as hereinafter provided.

Seventh. There shall be a committee selected from the company to

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by such jobbers, not to sell goods to dealers other than jobbers, at lower prices or upon better or more favorable terms than those shown in schedule C, attached to said 'Exhibit 1,' under the penalty that, if they refused so to do, no wall paper should

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be known as an auditing committee, which shall be made up from among the directors. Said committee shall have power to establish such a system of bookkeeping as in its judgment may be advisable.

In order to conform as nearly as may be to the laws of the various States in which the factories of the vendor are located, it is understood that the vendor shall not be at liberty to require from the company the acceptance of the product of more than ten hours per day of any one of said factories.

The product intended to be sold to the company hereunder and which the latter undertakes to acquire, does not contemplate the enlargement of the manufacturing facilities of the vendor, but nothing herein contained shall be construed as affecting the right of the vendor to substitute new machinery of the same capacity for any now in use which may become useless through wear or through destruction by fire or other casualty.

The power to designate the parties who are to be classed as jobbers and the discounts to which they are entitled is expressly reserved by the company, and such designation is to be made through its board of directors, but the vendor shall have the right to select the jobbers through whom the goods manufactured by it are to be distributed.

All orders placed with the vendor by jobbers on behalf of the company must at once be reported to the latter.

Eighth. The company hereby agrees to sell and the vendor agrees to purchase ——— shares of the common stock of the company, for which stock the vendor agrees to pay the sum of ——— in cash as soon after the execution and delivery of this agreement as the same may be demanded by the company, but only if and when the entire share capital of the company shall have been fully subscribed at not less than par.

The vendor will, after paying for said shares of stock, endorse the certificates representing the same, and deliver the certificates so endorsed in blank unto the company, upon the trust and agreement that the company shall hold said certificates as security for the performance by the vendor of each and all of the covenants and conditions of this agreement and that upon the refusal, neglect or omission of the vendor, its successors or assigns, to perform this agreement, or any part thereof, the said shares of stock and certificates represented thereby shall be immediately sold by the company at public or private sale, without

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be sold to such jobber by any of said corporations or firms, and that, thereby, such jobbers should be driven out of business; and that, in some form or other, so as to disguise the real nature of the transaction, all wholesalers other than jobbers should be compelled to make an agreement in writing, with said corporations or firms, not to sell such goods on terms better or more favorable than those specified in schedule C, attached to said 'Exhibit 1,' under penalty that if such wholesaler refuse to sign and carry out said agreement, no wall paper would be sold to him by any of said corporations or firms, and he should be driven out of business, and that the profits made by such prevention of competition and enhancement of price should be divided among said corporations and firms nominally as dividends upon said stock, but in reality, in proportion to their respective holdings as aforesaid, and that said committee of said corporation and said firms, calling themselves such directors, should regulate all the matters hereinbefore averred, prevent competition between said corporations and firms, limit production and enhance prices, and close all channels by which the consumer or retailer could obtain wall paper from the producers thereof.

"In pursuance of said agreement, said plaintiff was nominally incorporated with the stock aforesaid, divided into the

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notice, upon such terms and at such price as the company or its officers may deem reasonable, and that the proceeds of the sale be paid into the treasury of the company as agreed and liquidated damages to the company for the breach of said agreement.

The parties hereto have fixed upon the said stock, and the proceeds thereof, as liquidated damages, because of the difficulty in establishing, in a court of law, the actual damage that would be suffered by the company in the event of the refusal, neglect or omission to perform this agreement, and in order to avoid the difficulty of such proof.

In witness whereof, the vendor and the company have respectively caused this agreement to be executed by their respective presidents and their respective corporate seals to be hereto attached pursuant to resolutions of their respective boards of directors, the day and year first above written.

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number of shares aforesaid, of the par value aforesaid, which were divided among the parties to said agreement aforesaid, in the manner aforesaid, and said contracts signed by said The National Wall Paper Company, and said persons and corporations, being, at once, subscription for stock by said so-called vendors, the acceptance of such subscription by said The Continental Wall Paper Company, and by it, nominally, each so-called vendor sold unto the company, and the latter agreed to purchase, the entire product of wall paper manufactured by each of said vendors for the period from July 20th, A. D. 1898, to the first day of July, A. D. 1899.

"Said contract further fixed prices at which the merchandise should be nominally sold to the company, said prices being the cost of production with a slight profit added thereto, sufficient to cover incidental expenses merely. The prices at which said goods were to be nominally sold by said so-called vendors to said company are set forth in the schedule attached to said 'Exhibit 1' and marked 'A.'

"Said agreement further nominally provided that the goods pretended to be acquired by the company, from the so-called vendor, which were to be sold by jobbers, should be so sold by the company and not by the vendor, for the account of the company, but that the goods acquired by the company from the so-called vendor, which should be sold to wholesalers other than jobbers, should be sold by the so-called vendor for the account of the company.

"The schedule attached to said agreement contained a list of prices for all commodities in the wall paper line, which were called 'List' or 'Road Price,' and said contract provided that sales made to jobbers should be made at discounts from said 'List' or 'Road Prices' fixed in the schedule marked 'B,' annexed to said 'Exhibit 1;' but that, in all cases in which the goods were manufactured at places other than the cities of New York or Philadelphia, and sold to jobbers, the vendor should equalize the freights with either of the said cities, out of the proceeds receivable for such goods.

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"In reality, the agreement was, and so the business was carried on, that the manufacturers should maintain sample rooms and selling agents, and should solicit and receive the orders from all wholesalers, whether jobbers or so-called 'Road' or 'Quantity Buyers;' that the entire business should be done by said so-called vendors, but payments should be made by the jobbers to the so-called company, and by the wholesalers, other than jobbers, directly to the so-called vendors.

"Said contract further provided, in order to protect said corporations and firms against competition from each other, and to insure against violation of said agreement, or any of them, that, from time to time, invoices should be supplied, at once to the customer and to the company, upon shipment and delivery of such goods, specifying quantities and road prices; that each vendor should furnish to the company, at periods stated, just, true, and sworn statements of all shipments and deliveries of merchandise made by the vendors direct to the purchasers, which statements should contain the names of the purchasers, the character of the goods sold, and the prices at which they were sold, so that the company might receive the difference between the prices at which the goods were nominally billed to said company, and at which they were sold to the purchaser, to the end that this difference, being the net profits derived from such purchase and sale, should be divided among such corporations and firms, in proportion to the capacity of their respective businesses, determined as aforesaid, without regard to the amount sold by each.

"The prices at which, and the terms upon which, goods were to be sold by the vendors to all wholesalers other than jobbers, were designated 'Road' or 'List' prices, and were contained in the schedule marked 'C,' annexed to said 'Exhibit 1,' and forming a part thereof.

"For the further purpose of carrying out said agreement, and ascertaining said net profits, and for further disguising the real nature of the transaction, it was provided that the so-called vendor should receive from sales made by it to so-called

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'Quantity Buyers,' the difference between the discounts allowed to those designated in the classification hereinbefore referred to as 'Second Class Jobbers' and the discounts provided in said agreement to be made to purchasers styled, in said schedules, 'Quantity Buyers' in which the vendor is allowed the quantity discount, except that, where special and exclusive goods were sold, there should be an allowance of thirty (30 per cent) per cent discount to said vendor.

"Said agreement further stipulated that the prices of goods as fixed by said schedules A and C might be altered from time to time, but the discounts allowed to jobbers should not be altered at any time during the term of the agreement.

"Said written contract further provided that the so-called vendor should make collections of accounts for goods sold to wholesalers other than the jobbers, but that the company should collect the proceeds of sales to the jobbers, and that accounts should be stated between the so-called vendors and the company at stated periods, and the account accompanied by payment, by the so-called vendor, to the so-called company, of the difference between the prices at which the goods were to be billed to the company and the prices at which the so-called vendors had agreed to charge the 'Quantity-Buyers.'

"It was further stipulated in said agreement that monthly divisions should be made by said company of at least thirty (30) per cent of the 'Road Prices' of goods shipped to jobbers by the company.

"For the further purpose of protecting said corporations and firms and individuals from each other, preventing and stifling competition, and enforcing said combination, trust and monopoly, each of said corporations and vendors gave the company the right, and made it the duty of the company, to audit the books of account of said so-called vendors, at such times and in such manner as the company might from time to time deem necessary or proper. It was further stipulated that this right to examine and audit the books was of the essence of the agreement, and that a failure on the part of the so-called ven-

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dor, to permit the same, should operate as a breach of the contract, entitling the company to abrogate the agreement, to recover such damages as it might be able to establish, and to the forfeiture of the stock held by said vendor in such company.

"It was further provided that said so-called company should appoint an auditing committee from its directors, which should establish such a system of bookkeeping as it thought advisable.

* * * * * * * *

"It was further a part of said agreements, though not reduced to writing, save as it set forth in said exhibit, that all jobbers and other wholesalers of wall paper should be forced to sign an agreement, binding themselves to purchase their entire stock of wall paper, nominally either from plaintiff or from said corporations or firms, at prices fixed in said 'Exhibit 1,' and that they should only sell at prices fixed in the schedules attached to said 'Exhibit 1,' under the penalty, which the combination of all of said corporations and firms enabled them to enforce, that such jobbers or wholesalers, in case of refusal to accede to the terms so imposed, or in case of violation thereof, should be unable to buy wall paper; should be driven out of business, and should sacrifice the good-will and capital therein invested.

* * * * * * * *

"In the further carrying out of said purpose, said plaintiff and other persons, natural or artificial, engaged in the manufacture and sale of wall paper in different States of the Union, and in trade and commerce between the several States and foreign countries, whose names and locations these defendants are unable to state, entered into contracts substantially similar to 'Exhibit 1,' except that, instead of such persons pledging stock in plaintiff as security for the performance, by them, of the stipulations of said contract, they gave other security, the nature of which these defendants are unable to state, and which such other persons assume obligations, and gave, to said plaintiff, rights and powers, and said plaintiff exercised, as to them, such rights and powers, as were created by said instru-

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ment 'Exhibit 1,' and were exercised by plaintiff and its officers and directors in relation to the persons, natural or artificial, who were theretofore members of such combination and trust.

"In the further carrying out of said scheme to stifle competition; to restrain commerce between the States and Territories of the United States and with foreign countries; to unduly and unreasonably enhance prices, it was further agreed between the members of said combination and trust, that the so-called directors of plaintiff, being really a committee appointed, as aforesaid, by said the members of said trust or combination, should arbitrarily classify the wholesale dealers of wall paper in the United States and Territories thereof, into two (2) classes, namely, jobbers and 'Road' or 'Quantity Buyers;' that they should further arbitrarily classify the jobbers into 'first class,' and 'second class' and 'third class' jobbers; that they should further arbitrarily classify the other wholesalers into 'Road' or 'Quantity Buyers,' and 'Special Buyers;' that, being thus classified, they should all be compelled to sign written agreements, nominally with said company, really with said members of said combination or trust, obligating them to buy their entire stock of merchandise from said company.

"A copy of said agreement so to be signed by said jobbers, is attached hereto, marked 'Exhibit 2' [which is in margin [1]] and

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[1] EXHIBIT 2.

An agreement made this — day of ———, in the year one thousand eight hundred and ninety-eight, between the Continental Wall Paper Company, a corporation organized under the laws of the State of New York (hereinafter called the company), party of the first part, and ——— ———, of ——— (hereinafter called the jobber), party of the second part.

In consideration of the sum of one dollar, paid by the jobber unto the company for granting of this agreement, the receipt whereof is hereby acknowledged, and other valuable considerations, it is agreed between the parties hereto as follows:

First. That the company will sell, subject to such credit limitation as it may impose, and the jobber will purchase the entire requirements

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made part hereof, the same being printed forms with blanks for names, dates and amounts of purchases.

"To conceal the fact that it was an agreement to purchase from no one but said company, and the members of said combination and trust, the amount of purchases made by the buyer, in the previous year, from all the members of said combination or trust, being the entire amount of purchases made by such

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of the jobber in his business of selling wall paper for the business year ending July 1st, 1899, to the amount of a gross value, without discounts, of ———, the jobber reserving to himself the right to purchase such merchandise as he may need in excess of ——— from others.

The company is to deliver the goods without additional charge f. o. b. at New York or Philadelphia, or to equalize freights from the places at which it makes deliveries to either of said cities.

Second. The jobber shall be allowed discounts at the rates shown in the accompanying schedule, marked "A," which is hereby embodied in this agreement as a part thereof.

The terms of payment to be as follows: Four months from the date of invoice, with discount at the rate of 1 per cent per month for anticipated payment; provided settlement be made within 30 days from date of shipment, either by cash or note. Invoices for all goods shipped between October 15th and March 1st to take the latter date.

Third. Attached hereto, marked "B," is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchases, together with the terms of credit and freight allowance to which such customers are entitled.

It is an essential condition of this agreement that the jobber will not directly or indirectly sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in schedule "B," the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company.

The prompt performance by the jobber of the provisions of this agreement as to payment and otherwise is a condition precedent to exacting the continuous performance of said agreement by the company.

In witness whereof the company has caused this instrument to be executed, and the jobber has hereunto set his hand, the day and year first above written.

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buyer, during the preceding year, was ascertained, and an amount at least double thereof, being an amount supposed to be, and which was in fact, more than, by any possibility, could be needed by such buyer, was inserted in said blank as the amount to be purchased by such buyer from the company.

"By said agreement, the prices to be paid by the jobber were fixed according to the class in which he was arbitrarily placed, at prices enumerated in schedule B, attached to said 'Exhibit 1,' and the prices at which, alone, said jobber could sell were fixed as shown by schedule C, attached to said 'Exhibit 1.'

* * * * * * * *

"Schedule A attached to said 'Exhibit 2' is the same, so far as relates to jobbers of the class with whom the agreement is made, as the corresponding provisions of schedule B, attached to said 'Exhibit 1' and schedule B, attached to 'Exhibit 2' is the same as schedule C, attached to 'Exhibit 1.' The members of said combination and trust, and said plaintiff, further to carry out said agreement, compelled all other wholesale and quantity buyers to sign agreements in the form attached to this answer, marked 'Exhibit 3' [which is in the margin[1]], and

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[1] EXHIBIT 3.

In consideration of your having sold us wall paper, etc., at list prices and at quantity discounts as per following schedule:

	Per cent	Per cent
Up to 5½c. inclusive	600 rolls, 5	1200 rolls, 10
6c. to 9c. inclusive	300 rolls, 7½	600 rolls, 12½
10c. to 15c. inclusive	200 rolls, 10	400 rolls, 15
16c. and up	100 rolls, 10	200 rolls, 15

Discount on borders and ceiling papers follow the discounts on the hangings they match.

Plain ingrains.

Varnish tiles, 200 rolls or more, 10 per cent.

Ingrain borders, 26 rolls of a kind, 10 per cent

Ingrain borders, 50 rolls or over, 15 per cent.

We hereby agree not to sell any of such goods to others on terms bet-

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filed herewith; the same being a printed form with blanks for signatures and having attached thereto the prices shown in schedule C, attached to 'Exhibit 1,' which are the list prices referred to in said agreement.

"All said agreements, 'Exhibits 1, 2 and 3' were drawn for the purpose, and with the intent of disguising the real nature of the transaction and the real purpose, as herein set forth.

"In further carrying out said combination and with said purpose and intent, agreements were made by plaintiff and the members of said combination and trust, and persons, natural and artificial, in the Dominion of Canada, by which each agreed not to compete with the other, nor cut prices, the Americans in Canada, the Canadians in the United States.

"On, before and after said first day of July, A. D. 1898, this defendant had a large and profitable business of long standing, possessing a valuable good will, and in which it had a large capital invested, being what is generally called the business of a jobber or wholesaler of wall paper in the State of Ohio and throughout the States and Territories of the United States.

"The defendant and all other persons engaged in the wholesale wall paper business, at the beginning of each season, which commenced in September and closed the first of July, following, according to the custom of the trade, bought from the various persons engaged in the manufacture and sale of wall paper in the *United States, being the persons, members of said combination and monopoly, their* stock of wall paper to be sold by them during the ensuing year, such stock to be manufactured for them from samples submitted at the beginning of said season, in wholesale lots, and those for defendant to be shipped to Cincinnati, Ohio, and there resold by defendant, from time to time, to retail dealers throughout the States of Ohio, Kentucky,

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ter or more favorable than those specified in the above schedule nor lower than said list prices, and our faithful performance of this agreement is a condition precedent to the filling of our order.

The intent hereof is to protect you fully against being undersold by us among customers to whom you do [not] allow quantity discounts.

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Indiana, Illinois, and other States and Territories of the United States.

"At said time said members of said combination and trust having, by the agreements and acts aforesaid, obtained the control of the wall paper trade throughout the United States, at once greatly advanced the price of said wall paper, and threatened defendant that, unless it signed said agreement, 'Exhibit 2,' no wall paper would be sold to it; that said combination would make it impossible for it to buy wall paper, or to continue its business, and would drive it out of its said business, and compel it to sacrifice the good will owned by it as aforesaid, and the capital invested by it in said business.

"Said combination or trust then, and from that time thereafter, until the first day of July, A. D. 1900, had the power, by means of said combination and said agreements, and the will, to carry out its said threats, and deprive these defendants or any person, firm or corporation engaged in the business of selling wall paper in the United States, of the power to obtain wall paper for its or their trade, and the will and the power to drive out of business any person, firm or corporation engaged in the business of selling wall paper; deprive them of their good will, and compel them to sacrifice the capital invested in the business.

"In like manner, by the same means, all other jobbers and wholesalers of wall paper in the United States, and all persons engaged in commerce in the wall paper trade between the several States of the Union and foreign countries, were compelled to, and did sign the agreements attached to this answer, as 'Exhibits 2 and 3.'

"The immediate, intended and direct effect of the said combination and agreements was the stifling of competition between said manufacturers and vendors of wall paper, and between the jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one-half more than the price which it would be had the same been left to free and unrestrained competition; to compel said jobbers and whole-

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salers to pay such unduly enhanced and unreasonable price to plaintiff, and to members of said combination, and to exact from others an unduly enhanced price.

"After the making of said agreements, as before, the members of such combination solicited and received orders from this defendant, and all other wholesalers; filled their orders; charged the prices fixed in said schedules attached to said 'Exhibit 1' and directed that payment for such merchandise should be made by the jobbers to said plaintiff combination for said several members of said combination and trust, to be divided in the manner aforesaid. Said combination contrived, intended and did prevent free and unrestrained competition between the producers, and between the purchasers of wall paper, and between the jobbers and wholesalers of wall paper throughout the United States.

"Defendant avers that said plaintiff, and the members of said combination as aforesaid, being more than two persons, firms, corporations, partnerships, and associations, combined capital and skill for each and all of the following purposes, to wit: To create restrictions in trade and commerce; to carry out restrictions in trade and commerce; to limit the product of wall paper; to reduce the production of wall paper; to increase the price of wall paper; to prevent competition in the manufacturing and making of wall paper; to prevent competition in the sale of wall paper; to prevent competition in the purchase of wall paper; to fix a standard or figure whereby its price to the public or consumer should be controlled and established as to an article or commodity of merchandise, to wit: wall paper intended for sale, use and consumption in the States of Ohio, Indiana, Kentucky and Illinois; to make and enter into contracts, obligations and agreements by which they bound themselves not to sell or dispose of wall paper below a common standard figure or fixed value; to carry out contracts, obligations and agreements by which they bound themselves not to sell or dispose of wall paper below a common standard figure or fixed value; to make and enter into contracts, obligations

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and agreements by which they agreed to keep the price of wall paper at a fixed or graduated figure; to carry out contracts, obligations and agreements by which they agreed to keep the price of wall paper at a fixed or graduated figure; to make and enter into contracts, obligations and agreements by which they established and settled the price of wall paper between themselves and between themselves and others, so as to both directly and indirectly preclude a free and unrestricted competition among themselves, and among themselves and purchasers, and among purchasers in the sale of wall paper; to carry out contracts, obligations and agreements by which they established and settled the price of wall paper between themselves and themselves and others, so as to both directly and indirectly preclude a free and unrestricted competition both between themselves, and between themselves and purchasers, and between purchasers in the sale of wall paper; to make and enter into contracts, obligations and agreements by which they agreed to pool, combine, and both directly and indirectly unite the interests they had connected with the sale of wall paper so that its price might be affected; to carry out contracts, obligations and agreements by which they agreed to pool, combine and both directly and indirectly unite the interests that they had connected with the sale of wall paper so that its price might be affected.

"Said contracts and agreements were each and all combinations and conspiracies in restraint of trade and commerce among the several States, and with foreign nations, and had the intent and effect of restraining trade and commerce between the several States and with foreign nations, and were an attempt, by combinations and conspiracy, between the members of said combination and trust to monopolize the trade and commerce in wall paper among the several States and with foreign nations, and, by said contracts, and the acts done by members thereof, and by said plaintiff under and in pursuance thereof said plaintiff and the said members of said combination or trust did monopolize and attempt to monopolize the trade and

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commerce in wall paper among the several States and with foreign nations.

"In further carrying out of said scheme and combination the members thereof delivered to this defendant, in the year from September, A. D. 1898, to September, A. D. 1899, wall paper for which this defendant paid to said plaintiff, for and per direction of the members of said combination, the sum of one hundred and forty-four thousand eight hundred and fifty-four dollars and fourteen cents ($144,854.14).

"These defendants aver that the prices charged in said Exhibit attached to said amended petition [which are itemized accounts showing each article and the price therefor alleged to have been sold and delivered to the defendant] *are the prices fixed and determined in pursuance of and by the combination or trust agreement, as above set forth, and are unreasonable, unjust and excessive* and *at least one-half more than they would otherwise have been. In transacting all business aforesaid, at all said times, said business was transacted under and in pursuance of said combination or trust agreement, and for the purposes, and each of them, above specified, and not otherwise.*

"The allegations in said plaintiff's petition set forth as a suit on account are an attempt to enforce, carry out and recover upon and by virtue of said unlawful combination, aforesaid, *the prices fixed by such combination, and the prices therein sought to be recovered for said merchandise are unreasonable, excessive and above the fair market price of such merchandise by more than the amount so sought to be recovered.*

"Each and all of the provisions of said contract and agreement between said members of said combination and each other; between said so-called vendors and said plaintiff; between said members of said combination and said plaintiff and the so-called jobbers; between the members of said combination and trust and said plaintiff and the so-called 'Road' or 'Quantity Buyers,' are each and all contrary to the provisions of the statutes of the State of New York, where said plaintiff was organized; contrary to the provisions of the laws of the

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State of Ohio, where the merchandise was delivered; contrary to the laws of the several States where each of the members of said combination did business; contrary to the laws of the United States; and made criminal by the laws of each of said several States and by the laws of the United States; and each and all of said agreements aforesaid are contrary to public policy, and in violation of the rights of the defendant, and injurious to the interests of the consumer and of the public."

MR. JUSTICE HARLAN, after making the above statement, delivered the opinion of the court.

The Anti-Trust Act of 1890 declares illegal every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, and also declares it to be a misdemeanor, punishable by fine or imprisonment, or both, for any one to make any such contract or to engage in any such combination or conspiracy. § 1. It is also made a misdemeanor, punishable by fine or imprisonment, or both, for any one to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations. § 2. Similar provisions were made in reference to contracts, combinations in the form of trust or otherwise, or conspiracies, in restraint of trade or commerce in any Territory of the United States or in the District of Columbia, or between any such Territory or another, or between any such Territory or Territories and any State or States or the District of Columbia or with foreign nations, or between the District of Columbia and any State or States or foreign nations. § 3. The act further provided that any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful, may sue therefor in the Circuit Court of the United States in the district where the defendant resides or is found, without regard to the amount

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in controversy, and recover threefold the damages sustained by him. § 3. 26 Stat. 209.

The defendant contends that under the facts admitted by the demurrer it must be taken that the Continental Wall Paper Company is the representative in this suit of a combination or trust formed for the purpose of restraining and monopolizing trade and commerce among the several States in the manufacturing, buying, selling and dealing in wall paper; that this combination has the direct effect to accomplish that purpose; that the defendant, engaged in buying and selling wall paper in Ohio and other States, was compelled to become a party to the illegal combination or go out of business; that the account in suit was made up, as to prices and terms of sale, not upon the basis of an independent, collateral contract for goods sold and delivered, but with direct reference to, in conformity with and for the object of enforcing the agreements that constituted, or out of which came, the illegal combination whose business is carried on under the name of the Continental Wall Paper Company; that a judgment against the defendant upon the account in suit will, in effect, legally and practically aid the combination to reap the fruits of agreements that were illegal under the acts of Congress, and the making of which was declared by that act a crime; consequently, that the petition upon the facts admitted was properly dismissed.

That the combination represented by the plaintiff company is within the prohibitions of the above act of Congress is clear from the facts admitted by the demurrer. We assume, therefore, without discussion—for discussion is unnecessary—that there is a combination, of which the Continental Wall Paper Company is the representative, and that, in violation of that act, such combination was formed with the intent, and will have the effect, directly, to restrain as well as monopolize trade and commerce among the several States and with foreign nations as involved in the manufacture, sale and transportation of wall paper among the several States and with foreign nations. This part of the case is forcibly presented by the Cir-

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cuit Court of Appeals which, in its opinion delivered by Judge Lurton, well said: "The conspiring mills were situated in many States. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every State. Before the combination each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes. It must fall within the definition of a 'restraint of trade,' whether we confine ourselves to the common law interpretation of that term or apply that given to the term as used in the Federal act." 148 Fed. Rep. 939, 947.

But it is contended that however illegal the combination represented by the plaintiff may be, and whatever may be the effect of a judgment against the defendant, the plaintiff company is entitled to a judgment under the principles announced in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 545. Let us see what that case was and whether it may not be distinguished from the one now before us.

The Union Sewer Pipe Company, a corporation of Ohio, doing business in Illinois, brought suit against Connolly, a citizen of Illinois, upon promissory notes given in Illinois on account of the purchase by the defendant from that company, under contracts made in that State, of sewer pipe known as

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Akron pipe. It also brought suit against one Dee, a citizen of Illinois, upon an open account for the value of similar sewer pipe sold to him under a written contract, also made in that State. In each case the defendant disputed his liability for the value of the goods obtained from the Sewer Pipe Company upon the ground that at the time of their respective purchases that company was in a combination with certain firms, corporations and companies engaged in the manufacture of Akron pipe, which combination, it was alleged, was in illegal restraint of trade, and forbidden by the principles of the common law, as recognized and enforced both in Ohio and Illinois. The defense was also made that the Sewer Pipe Company was a combination doing business throughout the United States and between Ohio and Illinois, in the form of a trust, in restraint of trade and commerce among the several States, contrary not only to the Anti-Trust Act of Congress of July 2d, 1890, c. 647, but contrary to the Illinois Anti-Trust statute of January 1st, 1893, forbidding, under penalties, the combination of capital, skill or acts for certain specified purposes. 26 Stat. 209; Laws Ill. 1893, p. 182; Hurd's Rev. Stat. Ill., 1899, p. 618, title Criminal Code.

The defense based upon the principles of the common law was overruled in the *Connolly Case*, the court saying: "Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them. It could pass a title by a sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference, generally, to the sale of Akron pipe." Again, after referring to several cases establishing the general

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principle that a court will not lend assistance to carry out the terms of an illegal contract, and that one purchasing and receiving goods under a contract, expressed or implied, to pay for them, cannot refuse to pay simply because of the illegal character of his vendor, the court proceeded: "In the present [Connolly] case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would, in itself, be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and the other corporations, firms or associations whereby an illegal combination was formed for the sale of sewer pipe."

Turning to the defense based on the Anti-Trust Act of Congress, the court in the *Connolly Case* said: "Much of what has just been said in reference to the first special defense based on the common law is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination

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thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid." Further: "Nor can the defendants refuse to pay for what they bought upon the ground that the seventh section of the Sherman act gives the right to any person 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful' by the act, to sue and recover treble the damage sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and

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other corporations, firms or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that 'unliquidated damages arising out of covenants, contracts or torts disconnected with plaintiff's claim cannot be set off under the statute.' "

We need not here refer to that part of the *Connolly Case* relating to the defense based on the Anti-Trust Act of Illinois; for, the court adjudged that act to be void because of a certain provision in it which, contrary to the Constitution of the United States, denied the equal protection of the laws to all persons within the jurisdiction of the State, except a named favored class.

The present case is plainly distinguishable from the *Connolly Case*. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. *His* contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, *nor part of nor in execution of any general plan or scheme that the law condemned.* The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the *Connolly Case* was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained either upon the principles of the common law or under the Anti-Trust Act of Congress.

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The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, *it is admitted by the demurrer was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme.* We state the matter in this way, because the plaintiff by its demurrer admits for the purposes of this case the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several States.

The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the *Connolly Case.* In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground *merely* that the seller, which owned the goods was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the *Connolly Case.* The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of

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both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in anyway, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay.

In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.

In *Hanauer* v. *Doane*, 12 Wall. 342, 349, this court said: "The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members."

In *McMullen* v. *Hoffman*, 174 U. S. 639, 654, 669, where

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the authorities are reviewed and the whole subject carefully examined, the court said: "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract"—citing many English and American cases —"The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law." In that case the principle announced in *Coppell* v. *Hall*, 7 Wall. 542, 558, was reaffirmed, namely: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reason. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

In *Embrey* v. *Jemison*, 131 U. S. 336, 348, the defendant, who was sued upon promissory notes given in execution of a previous verbal contract that was illegal, this court said that he could not "be permitted to withdraw attention from this

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feature of the transaction by the device of obtaining notes for the amount claimed under the illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value in the hands of the defendant which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of and are directly connected with a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law. *Coppell* v. *Wall*, 7 Wall. 542, 558."

In *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45, 46, which involved, in part, the question whether a particular contract made in California for the purchase of tiles related to interstate commerce, and was illegal, the court said: "The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tiles by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the State of California, and becomes a part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce."

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So, in *Swift & Co.* v. *United States*, 196 U. S. 375, 396: "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens* v. *Wisconsin*, 195 U. S. 194, 206."

In *Bement* v. *National Harrow Company*, 186 U. S. 70, 87, 88, the court, after referring to that section of the act of Congress relating to suits by the Attorney General and by persons injured in their business or property, said: "Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that any one sued upon a contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action. The first section of the act provides that 'every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.' Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defense, and we think when proved it is a valid de-

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fense to any claim made under a contract thus denounced as illegal."

Again, in the recent case of *Loewe* v. *Lawlor*, 208 U. S. 274, 301, which involved the inquiry whether certain acts could be regarded as in restraint of interstate commerce, the court said: "So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a State and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of Federal authority, still, as we have seen the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purpose of the combination was, as alleged, to prevent any interstate transportation at all, the fact that the means operated at the one end before physical transportation commenced and at the other end after the physical transportation ended, was immaterial." See also *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 412.

The adjudged cases all hold that upon the question whether the particular contract sought to be enforced arises out of an illegal transaction, the court will not be restricted to a partial statement of the facts but will consider all the circumstances connected with the transaction so as to ascertain its real nature. In *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 247, the court said that "all the facts and circumstances are, however, to be considered in order to determine the fundamental question whether the necessary effect of the combination is to restrain interstate commerce."

Upon the whole case, and without further citation of authorities, we adjudge, upon the admitted facts, that the combination, represented by the plaintiff in this case, was illegal under the Anti-Trust Act of 1890; that it is to be taken as one intended, and which will have the effect directly, to restrain and monopolize trade and commerce among the several States and with foreign States; and that the plaintiff cannot have a judgment for the amount of the account sued on, because, for

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the reasons we have stated, such a judgment would, in effect, aid the execution of the agreements which constituted that illegal combination. We consequently hold that the Circuit Court of Appeals properly sustained the third defense, and rightly dismissed the suit. Its judgment must be affirmed.

It is so ordered.

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE BREWER, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM, dissenting.

This action is for goods admitted to have been sold and delivered by the plaintiff to the defendant, and the question arises, as has been explained, on demurrer to the third defense. The elements of that defense may be stated in a few words. Nearly all the manufacturers of wall paper in the United States formed a combination which, under the present policy of the law, was an illegal attempt to restrain and monopolize trade in and among the several States. As a part of the scheme the plaintiff corporation was created, which by the agreement became the purchaser of the products of the constituent companies, and was to sell the same, although the constituent companies continued to manufacture and to carry on the business of soliciting orders. The only material facts about this agreement are that under it the plaintiff got title to the goods, that it fixed prices at which goods were to be sold, and that it contemplated compelling the jobbers and others who bought to purchase at those prices, if they were to get any paper at all. The conspirators threatened and had the power to drive any jobber out of business who did not come in.

In pursuance of the combination and its purpose the defendant, a jobbing house, and all other jobbers, were compelled to sign a contract which, in effect, bound them to buy all the wall paper needed in their business from the plaintiff at the above-mentioned prices, and which made it an "essential condition of this agreement" that they should not sell at lower prices

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or upon better terms than those at which the plaintiff sold. After these two contracts were made the defendant ordered the goods in question at the prices named. It is alleged that those prices were unreasonable, and it is alleged, repeatedly and with much detail, that all the arrangements were made and all the business was done in furtherance of the plan set forth, contrary to the law of the United States and of the States concerned, and in violation of the defendant's rights, this suit being the final step in the attempt to carry out the plan.

It seems to me that the foregoing facts show no defense. I will consider them in their successive degrees of connection with the affair, and in the first place will take up the terms of the actual contracts in suit. These were ordinary parol sales made by the owner of goods. The suit was not upon the general agreement between the plaintiff and defendant. That by itself sold nothing, and it may be questioned whether it purported absolutely to bind the defendant to buy a roll of paper. See *Dennis* v. *Slyfield*, 117 Fed. Rep. 474; *Sterling Coal Co.* v. *Silver Spring Bleaching & Dyeing Co.*, 162 Fed. Rep. 848, 850. The actual contracts by which the plaintiff bound itself to deliver, and the sales under which it did deliver the specific goods for which it seeks to recover the price, were made after the making of the general agreement, as it is apparent on the face of that agreement that they must have been, and as is alleged by the answer in so many words. Each was a separate transaction. There is nothing alleged concerning the terms of these parol sales that has any element of illegality about it.

Next as to the effect of the general agreement between the plaintiff and defendant. It is alleged that after it was made the members of the combination solicited, received and filled orders, and charged the prices fixed in the original combination agreement. It is not alleged that either agreement was referred to even by implication. The sales are left by the answer as so many distinct transactions. But if, in order to help the defendant to escape, we are to infer that the orders were given with implied reference to the general contract, what ef-

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fect could such a reference have? Plainly only to fix the price, and for this purpose it was simply a schedule, figures on a piece of paper or in the memory of the parties, which were adopted by pointing to them in some way, as if they had been written on a blackboard. It did not matter whether the document pointed at was lawful or unlawful, as the whole business was done by the later contracts. See *Interstate Consolidated Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79, 84, 85.

If the condition in the general agreement between the plaintiff and defendant made it bad, still it went only to that agreement and to the plaintiff's promise to sell at certain prices, not to any subsequent sales, or to the defendant's title to goods got under subsequent sales. If it had been incorporated in any way into the specific sales, it would be necessary to consider the case of *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179, 185. But no such incorporation is alleged, or in any probability could have been alleged. So I think that I may assume that the parol sales were made no worse, on their face, by any reference to the content of the general agreement. And I may add that the unlawfulness of the general agreement would not make the sales bad from the outside, so to speak, if that was all that there was against them. A lawful purchase is not made unlawful merely by being the fulfillment of an unlawful contract.

It has been suggested that the plaintiff was not the real seller and only got its standing from the general agreement with the defendant, and that therefore it had to rely upon an illegal contract to make out its case. But the defense does not deny that the plaintiff became the owner of the goods or that the manufacturers sold in its name as the original combination provided. It is true that it says that the arrangements were made with a view of disguising the real transaction and purpose, and that really the business was to be done by the manufacturers, as I have stated. But it adds that payments were to be made to the plaintiff, and it nowhere suggests that the first contract set forth did not operate, or that the plaintiff

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did not get the title it professed to transfer. Its illegality would not prevent the title passing. If the defendant meant to deny that it bought from the plaintiff goods which the plaintiff owned, it was very easy to deny it and to leave the plaintiff to set up the agreement if it did not join issue, as it naturally would. As the defense stands, I think it means, as I have no doubt is the fact, that the technical legal title to the goods was in the plaintiff, and that the defendant purported to contract with it, the manufacturers selling in its name.

I now pass to the more remote considerations that are supposed to have a greater effect. It is said that the specific sales, the general agreement and the original combination all are steps in one illegal plan, and that the plan gives character to the whole. But we must be more precise. The plaintiff alone was party to the plan. The defendant represents itself as a victim, and says that the plan was against its rights. On what ground then does the illegal purpose of the plaintiff warrant the defendant in professing to buy its goods and then refusing to pay for them?

The plaintiff's unlawful purpose did not make it unlawfu to buy the plaintiff's goods. It is decided, if decision is necessary, that a purchaser cannot escape merely on the ground that the seller is an unlawful trust. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397. I repeat that it is not alleged that the defendant in any way shared the plaintiff's intent, but to go further than I need, I will assume that it may be taken to have made the general contract with knowledge of that intent. But it cannot be contended that, therefore, it was party to a transaction illegal for that reason. Whenever a party knows that he is buying from an illegal trust, and still more when he buys at a price that he thinks unreasonable but is compelled to pay in order to get the goods he needs, he knows that he is doing an act in furtherance of the unlawful purpose of the trust, which always is to get the most it can for its wares. But that knowledge makes no difference, because the policy of not

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furthering the purposes of the trust is less important than the policy of preventing people from getting other people's property for nothing when they purport to be buying it. And if knowledge of the purchaser that he is furthering the purpose of the trust makes no difference, it makes no difference whether he is glad or sorry for the result. A man does not make conduct otherwise lawful unlawful simply by yearning that it should be so. In this case however the defendant was an unwilling accessory, exactly as Dee was in the *Connolly Case*.

The effect of the defendant's knowledge of the plaintiff's scheme is not greater because it signed the illegal general contract. I think that I have shown that the illegality of that contract, taken by itself, did not make the specific sale illegal, and from the point of view that all that was done was a carrying out of the plaintiff's illegal scheme, it does not matter to the legality of the sales whether a particular previous step was legal or not. If knowledge that the plaintiff was attempting to monopolize, and that it sold at prices fixed in aid of the intent would not exonerate the defendant when it yielded to its necessities and bought, the same knowledge would have no greater effect if the same necessities led it to agree beforehand to do what it did.

Perhaps, in order to answer every aspect that this rambling defense presents, I ought to say in conclusion that the allegations that the price was unreasonable, and that the plaintiff threatened and had power to drive jobbers out of business that did not come into its arrangement, is not stated in such form as to make a case of duress. I think that that would have been the strongest ground on which the defense could have been put. Courts and legislation sometimes have recognized that the so-called freedom to contract or not may be made illusory by the economic situation of one of the parties. *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 12. It would be extending the recognition further than it yet has been extended, so far as I am aware, to apply it to a case like this. But I express no opinion upon its possible ap-

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plication because, as I have said, the allegations are not directed to that end, and do not sufficiently show that the specific purchases were induced by fear. Moreover, as such duress, like fraud, goes only to motives, *The Eliza Lines*, 199 U. S. 119, 131, if the frightened or defrauded party would rescind he must restore the consideration, or at least be ready to pay the reasonable price, of neither of which is there any hint.

I think that this decision must mean that *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, ought to have been decided the other way. There, as here, there was, or was assumed to be, an illegal trust. In furtherance of the purposes of the trust a general agreement was made between the trust and the defendants, the purchasers, which required defendants to buy from the plaintiff alone at prices alleged to be unreasonable, they receiving a rebate upon that consideration, and which fixed a price at which the defendants would sell. There was just as much of a scheme and just the same scheme in that case as in this. In both the defendants coöperated as victims to the monopoly in precisely the same way. The facts spoke for themselves, and were the same. Nothing is added to the case by calling the arrangements set forth a scheme, but similar language was used in the former case, as appears from the record. The contract will be found in the same record. It was assigned as error and argued that the Circuit Court ruled that the said contract, again set forth, was not void. For these reasons I feel compelled to dissent from the judgment of the court. I am authorized to say that Mr. Justice BREWER, Mr. Justice WHITE and Mr. Justice PECKHAM concur in this dissent.

MR. JUSTICE BREWER, dissenting.

Concurring in the views expressed by Mr. Justice Holmes, it seems to me another matter is worthy of consideration.

The transactions between the plaintiff and defendant were, as held by the court, in violation of the Anti-Trust Act, 26

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Stat. 209. That act defines the rights and liabilities of the parties. The first three sections prohibit contracts and combinations in restraint of trade and monopolies; declare a person violating the provisions of these sections guilty of a misdemeanor and prescribe the punishment. Section 4 gives power to the Circuit Courts of the United States to prevent and restrain violations of the act. Section 6 provides for a forfeiture of property owned under any contract or combination or pursuant to any conspiracy, and seized while in course of transportation. Section 7 declares that any person injured in his business or property by reason of anything forbidden or declared to be unlawful in the act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold damages by him sustained.

The present case comes within the proposition that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." *Farmers & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35; *Barnet* v. *National Bank*, 98 U. S. 555. These two cases arose under the National Banking Act of June 3, 1864, c. 106, 13 Stat. 99, and illustrate the doctrine referred to. That act prescribed the rate of interest which might be taken by national banks, and added that knowing and receiving a greater rate of interest should forfeit the entire interest; or if the interest had been paid, that the person paying might recover in an action of debt twice the amount of interest thus paid. These cases held that relief for a violation of the statute was a forfeiture of the interest due and not paid, or in case the interest had been paid an action of debt to recover double the amount paid. See also *Oates* v. *National Bank*, 100 U. S. 239.

In *Stephens* v. *Monongahela Bank*, 111 U. S. 197, it was decided that the remedy prescribed by the statute was exclusive. In *Driesbach* v. *National Bank*, 104 U. S. 52, it was held that usurious interest paid a national bank on renewing a series of

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notes could not in an action by the bank on the last of them be applied in satisfaction of the principal of the debt.

Now, the remedies given in the Anti-Trust Act are three in number: First, a criminal prosecution; second, a forfeiture of property; and, third, an action by any person injured to recover threefold the damages by him sustained. These being the remedies prescribed, are exclusive. The defendant sought neither of these remedies. It was not so anxious for the public welfare as to make complaint and secure criminal proceedings. There was no property to be forfeited. It did not seek to recover threefold the damage it had sustained, but only to avoid paying for the property it had purchased. The reason therefor is suggested in the opinion of the Circuit Court of Appeals, 148 Fed. Rep. 939, 950:

"The averment that they paid 50 per cent more for their gross purchases in consequence of the illegal combination has little merit in it, moral or otherwise. They doubtless sold again at the great minimum profit they agreed to exact from retailers, and the retailers later exacted the undue profit from the consuming public."

Something of the same idea of the exclusiveness of a statutory remedy finds expression in *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, in which it was held that a carrier could not maintain an action at common law for excessive and unreasonable freight charges exacted on interstate shipments, where the rates charged were those which had been duly fixed by the carrier according to the interstate commerce act, and had not been found to be unreasonable by the Interstate Commerce Commission, and this notwithstanding the provision in § 22 of the act to regulate interstate commerce: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

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UNITED STATES v. MARVIN.

APPEAL FROM THE COURT OF CLAIMS.

No. 436. Submitted January 7, 1909.—Decided February 1, 1909.

The bankruptcy court of the United States is always open for the transaction of business whether the judge be personally present or not; and, under §§ 574, 638, 828, Rev. Stat., and chap. II, § 2, of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 545, clerks of the United States courts are entitled to the *per diem* compensation for those days on which voluntary petitions in bankruptcy are referred to the referee during the absence of the judge. *United States* v. *Finnell*, 185 U. S. 236, followed; *Owen* v. *United States*, 41 C. Cl. 69, approved.

42 C. Cl. 542, affirmed.

Mr. Assistant Attorney General John Q. Thompson and *Mr. Philip M. Ashford, Attorney*, for the United States.

Mr. Charles C. Lancaster for appellee.

PER CURIAM: This suit was brought to recover the sum of $535, "for services rendered on behalf of the United States from June, 1900, to April 1, 1906, to wit: For attendance on court while actually in session during the terms, with the judge presiding and judicial business actually transacted in court, as provided by §§ 574, 638 and 828, Rev. Stat., and chapter II, § 2, Bankruptcy Act (30 Stat. L. 545), 107 days at $5.00 per day."

The Court of Claims filed its findings of fact and conclusion of law April 20, 1908, as follows:

"*Findings of fact.*

"I. During the times hereinafter mentioned the claimant,

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Edwin E. Marvin, was clerk of the District and Circuit Courts of the United States for the District of Connecticut.

"II. For services on behalf of the United States during the period from July 1, 1900, to April 1, 1906, the claimant made up his supplemental accounts duly verified, and presented the same to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the Attorney General and the accounting officers of the Treasury Department for payment, and the payment of the items embraced in Finding III was refused.

"III. Said items, the payment of which was so refused, were alleged to be for attendance on court while actually in session during the terms, or when business was transacted in court upon order of the judge, and were for 107 days at $5.00 per day, making $535.

"The business so transacted was the reference by the clerk to the referee of voluntary petitions in bankruptcy filed during the absence of the judge from the district. No written orders were received by the clerk to open the court for the purpose of making said references, or for any other purpose; the judge was not personally present, and no writs, orders or decrees were received from the judge sitting in chambers. The journal made by the claimant does not show that the court was open on any of the days for which *per diems* are claimed. The claimant, after learning of the decision of the Court of Claims in the *Owen case* (41 C. Cls. R. 69), went back in his District Court journal and on the last day of every month over which his account extended interlined the days in such month upon which he had made references, merely stating them as days in which court business in bankruptcy proceedings was transacted.

"*Conclusion of law.*

"Upon the foregoing findings of fact the court decides, as a conclusion of law, that, under the *Owen case* (41 C. Cls. R. 69),

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and the *Finnell case* (185 U. S. 236), the claimant is entitled to a judgment for five hundred and thirty-five dollars ($535)."

And entered judgment without an opinion. 42 Ct. Cls. 542.

The case was brought here by appeal and submitted on printed arguments.

Counsel for appellee referred to a certified copy of the order of court approving the account referred to in Finding II, stating that it was attached to the account of claimant now on file in the Court of Claims. That order contains, among other things, "It is hereby certified that upon each day for which a *per diem* is charged in this account the court was opened for business and court business transacted in bankruptcy matters as stated."

The Government objects on the ground that the order is not set forth in the findings, and moreover that the paragraph is of no effect, "because in the nature of a statement of a conclusion of law."

The various applicable statutory provisions will be found in *United States* v. *Finnell*, 185 U. S. 236, and in *Owen* v. *United States*, 41 Ct. Cls. 69.

We concur with the Court of Claims that the two cases cited govern the disposition of this case, and, accordingly, affirm the judgment.

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THOMAS *v.* STATE OF TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS.

No. 6. Argued November 8, 1908.—Decided February 23, 1909.

Where neither the constitutionality of the state statute, nor the interpretation thereof by the state court, is assailed, but the contention is that negroes were excluded from the juries because of their race or color, the question is one of fact, and the decision of the state court is not reviewable by this court under § 709, Rev. Stat., in the absence of such gross abuse as to amount to denial of due process of law.

Discrimination against the accused in the selection of the grand or petit jury cannot be presumed from the mere fact that none of the jurors were negroes or of African descent; and here it appears that a negro was on the grand jury finding the indictment and negroes were on the venire from which the trial jury was drawn, and nothing in the record indicates discrimination.

95 S. W. Rep. 1069, affirmed.

THOMAS was convicted of the murder of John Blair, and his punishment fixed at death. Before arraignment and trial he filed his separate motions to quash the indictment and special venire drawn in this cause, which motions were sworn to, and alleged that "because of the race prejudice and ill feeling against the negroes in Harris County, and against this defendant in particular, on account of his color and race, and because of the sentiment against placing negroes, or persons of color, or of African descent, upon the grand juries and petit juries in said county . . . the grand jury finding and returning the bill of indictment against him herein was composed almost exclusively of white persons, there being not to exceed one negro, or person of African descent, and of the same race and color of this defendant upon said grand jury." It was also alleged that "because of the race prejudice and ill feeling existing against

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the negroes or persons of African descent in Harris County, and against this defendant in particular, on account of his color and race, there were no negroes or persons of African descent upon the venire list of persons drawn to serve as jurors in this cause, and that the list of jurors drawn was composed exclusively of white persons, all negroes or persons of African descent having been intentionally excluded and left off of the special venire or list of jurors drawn in this cause by the jury commission because of their race and color." It was further alleged that one-fourth of the qualified jurors of Harris County were negroes or persons of African descent. By agreement and consent of the court evidence was heard upon the two motions at the same time, and considered by the court upon each, the same as if said motions had been heard separately.

Upon considering the evidence on the hearing of said motions, the same were each overruled by the court.

The case was taken on writ of error to the Court of Criminal Appeals, the highest court of Texas for criminal cases, and the conviction affirmed. The action of the trial court in overruling the motions to quash was reviewed by the Court of Criminal Appeals and the rulings sustained. 95 S. W. Rep. 1069. It was then brought here on writ of error.

Mr. Noah Allen and *Mr. Frederick S. Tyler* for plaintiff in error:

Whenever by any action of a State, whether through its legislature, courts, executive or administrative officers, all persons of the African race are excluded, solely because of race and color, from serving as grand or petit jurors in the criminal prosecution of a person of that race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment. *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 344; *Neal* v. *Delaware*, 103 U. S. 370; *Gibson* v. *Mississippi*, 162 U. S. 565; *Carter* v. *Texas*, 177 U. S. 442; *Martin* v. *Texas*, 200 U. S. 316.

It is admitted that a mixed jury, some of which shall be of

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the same race with the accused, cannot be demanded as of right in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment, *Virginia* v. *Rives, supra; Neal* v. *Delaware, supra; Martin* v. *Texas, supra;* but that the accused is entitled to demand, under the Constitution of the United States, that in organizing the grand jury, as well as impanelling the petit jury, there shall be no exclusion of his race, and no discrimination against them because of their race or color, is conclusively settled by the decisions. *Virginia* v. *Rives, supra; In re Wood,* 140 U. S. 278, 285; *Martin* v. *Texas, supra; Farrow* v. *State,* 45 So. Rep. 619; *Montgomery* v. *State,* 45 So. Rep. 879.

Mr. Robert Vance Davidson, Attorney General of the State of Texas, and *Mr. James DuBose Walthall,* for defendant in error:

The trial court having permitted plaintiff in error to introduce evidence and offer proof in support of his motion to quash the indictment and special venire drawn in his case, and having considered said evidence and overruled the motion upon the ground that no discrimination against him was shown, and the Court of Criminal Appeals, the highest court in Texas in criminal cases, after a full review of the testimony, having decided that the trial court acted properly in overruling said motion, such ruling will not be disturbed by the Supreme Court of the United States upon writ of error. *Barrington* v. *Missouri,* 205 U. S. 484; *Allen* v. *State,* 70 S. W. Rep. 85; *Monroe* v. *State,* 23 Texas, 210; *Nash* v. *State,* 2 Texas App. 362; *Hawkins* v. *State,* 27 Texas App. 273; *Shaw* v. *State,* 32 Texas Cr. Rep. 155.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

It is not contended that the laws of Texas, under which grand and petit juries are selected, are in themselves discriminating and in violation of the Constitution of the United States. It is admitted by plaintiff in error that neither the constitution nor statutes of Texas prescribed any rule for, or mode of procedure

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in, the trial of criminal cases which is not equally applicable to all citizens of the United States and to all persons within the jurisdiction of the State without regard to race, color, or previous condition of servitude. Nor is it contended that the constitution and laws of the State had, at the time this prosecution was instituted, been so interpreted by the courts of Texas as to prevent the enforcement of rights secured equally to all citizens of the United States without regard to race or color. The only contention was that the jury commissioners in the selection of the grand and petit juries who returned the indictment and tried plaintiff in error did in fact exclude therefrom negroes or persons of African descent, because of their race and color. This was a question of fact, and the ordinary rule is that questions of fact will not be reviewed by this court on writs of error to state courts.

In the case of *In re Kemmler*, 136 U. S. 436, 449, it was intimated that if the highest court of a State "had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States," this court might take jurisdiction, but the occurrence of such an instance was not suggested as probable.

In *Barrington* v. *Missouri*, 205 U. S. 483, 484, the plaintiff in error, before the trial of the cause commenced, applied for a change of venue on the ground of local prejudice. Upon the hearing of the application many witnesses were examined and testified. and the trial court decided that prejudice justifying a change of venue had not been made out and denied the application. In dismissing the writ of error in the above case we said:

"It is now contended that the refusal to grant the change of venue deprived plaintiff in error of a fair and impartial trial, to which, under the Federal Constitution, he was entitled. The state Supreme Court held it to be a well-settled rule of law in Missouri that the granting of a change of venue in a criminal case rested largely in the discretion of the trial court, and 'that

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where the trial court has heard the evidence in favor of and against the application, and a conclusion reached adversely to granting the change, such ruling will not be disturbed by this court, and should not be unless there are circumstances of such a nature as to indicate an abuse of the discretion lodged in such court.' And the Supreme Court, after a full review of all the testimony, decided that the trial court had acted properly in overruling the application for a change of venue. In our judgment no Federal question was involved. Were this otherwise it would follow that we could decide in any case that the trial court had abused its discretion under the laws of the State of Missouri, although the Supreme Court of that State had held to the contrary."

It was ruled in *Martin* v. *Texas*, 200 U. S. 316, as in other cases, that discrimination in organizing a grand jury and impanelling a petit jury cannot be established by merely proving that no one of the defendant's race was on either of the juries, and that an accused person cannot of right demand a mixed jury, some of which shall be of his race, nor is a jury of that kind guaranteed by the Fourteenth Amendment to any race. And it was said "What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the impanelling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color."

As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the Court of Criminal Appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the Court of Criminal Appeals, setting forth the evidence, justifies the conclusion of that court that the negro race was not intentionally or otherwise dis-

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criminated against in the selection of the grand and petit jurors. Indeed, there was a negro juror on the grand jury which indicted plaintiff in error, and there were negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box. The court said:

"It may be that the jury commissioners did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit jurors in this case, still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated. We understand the rule to be that mere error in administering the criminal law of the State, or in the conduct of a criminal trial, no Federal right being invaded or denied, is beyond the revisory power of the Supreme Court of the United States under the Constitution and the statutes regulating its jurisdiction."

No other point requiring consideration, the result is

Judgment affirmed.

JOHNSON v. MUESER.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 67. Argued January 12, 1909.—Decided February 23, 1909.

Frasch v. *Moore*, 211 U. S. 1,[1] followed to effect that decisions of the Court of Appeals of the District of Columbia in appeals from the Commissioner of Patents are not reviewable by this court.

Writ of error to review 29 App. D. C. 61, dismissed and certiorari denied.

THE facts are stated in the opinion.

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[1] For headnote in *Frasch* v. *Moore*, see *post*, p. 285.

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Mr. Melville Church, with whom *Mr. James A. Carr* was on the brief, for plaintiff in error.

Mr. Stephen J. Cox, with whom *Mr. William Raimond Baird* was on the brief, for defendant in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was a proceeding of interference in which the examiner of interferences awarded priority to Mueser. This decision was in turn affirmed by the examiners-in-chiefs and by the Commissioner. From the decision of the Commissioner an appeal was taken to the Court of Appeals of the District of Columbia, and that court affirmed the decision of the Commissioner of Patents, and directed that its own decision be certified to the Commissioner of Patents, as required by law. The court held that in such a proceeding it would not review the action of the Patent Office in deciding that the issue was a patentable one, but would confine its consideration to the question of priority alone. 29 App. D. C. 61. And in the course of its opinion the court said:

"It must be borne in mind that the final judgment of this court entitling a claimant to a patent, in either an *ex parte* or an interference proceeding, is not conclusive of either patentability or priority. The patent, when issued, may be attacked in the courts by parties whose interests may be affected by the monopoly claimed thereunder; and the defeated party has another remedy by proceeding in a court of equity, as provided in § 4915, Rev. Stat."

We think our ruling in *Frasch* v. *Moore*, 211 U. S. 1, is applicable, and that this writ of error must be disposed of accordingly. The application for certiorari must take the same course.

Writ of error dismissed.
Certiorari denied.

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E. C. ATKINS & COMPANY v. MOORE, COMMISSIONER OF PATENTS.

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 86. Argued January 22, 1909.—Decided February 23, 1909.

Proceedings under the Trade-Mark Act of February 20, 1905, c. 592, 33 Stat. 724, and the specific provisions of § 9 thereof, are governed by the same rules of practice and procedure as in the instance of patents; and decisions of the Court of Appeals of the District of Columbia on appeals from the Commissioner of Patents are not reviewable by the court. *Frasch* v. *Moore*, 211 U. S. 1, followed;[1] *Gaines* v. *Knecht & Son*, 27 App. D. C. 530, approved.

PLAINTIFFS filed their application for a trade-mark on June 12, 1905, in which it was recited that—

"The trade-mark consists of a symbol composed of the letters 'AAA' . . . The trade-mark is usually displayed on the goods, by etching, stamping or otherwise marking the same upon the blade of the saw, and by inscribing same upon the packages containing such saws."

This was amended August 30, 1905, by adding the sentence—

"The trade-mark is shown with the letters arranged in the form of a monogram."

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[1] The headnote in *Frasch* v. *Moore*, 211 U. S. 1, is as follows:

A decision of the Court of Appeals of the District of Columbia in an appeal from the Commissioner of Patents under Rev. Stat., §§ 4914, 4915, § 9 of the act of February 9, 1893, c. 74, 27 Stat. 434, and § 780, Rev. Stat., District of Columbia, is interlocutory and not final and is not reviewable by this court under § 8 of the act of February 9, 1893, either by appeal or writ of error. *Rousseau* v. *Brown*, 21 App. D. C. 73, approved.

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The examiner suggested that the description of the trade-mark should be amended so as to read—

"The trade-mark consists of a monogram composed of the letters 'A.A.A.'"

Plaintiffs declined to comply with the suggestion, and appealed from the ruling of the examiner that such amendment should be made to the Commissioner of Patents, who, on February 20, 1906, overruled the decision of the examiner and held that the description was sufficient.

April 27, 1906, plaintiffs were notified that their—

"Application for the registration of a trade-mark for a symbol composed of the letters 'AAA,' for saws of all kinds, filed June 12, 1905, Ser. No. 7998, has been examined and passed for publication, in compliance with section 6 of the act authorizing the registration of trade-marks, approved February 20, 1905. The mark will be published in the Official Gazette of May 15, 1906."

The act of February 20, 1905, c. 592, § 1, 33 Stat. 724, provided that the applicant should file an application in writing, which should contain, among other things:

"A description of the trade-mark itself and a statement of the mode in which the same is applied and affixed to goods and the length of time during which the trade-mark has been used. With this statement shall be filed a drawing of the trade-mark, signed by the applicant or his attorney, and such number of specimens of the trade-mark, as actually used, as may be required by the Commissioner of Patents."

This act was amended by the act of May 4, 1906, c. 2081, § 1, 34 Stat. 168, by inserting after the words "description of the trade-mark itself," the words "only when needed to express colors not shown in the drawing."

On June 21, 1906, the Patent Office sent plaintiffs the following communication:

"Attention is directed to the act approved May 4, 1906, providing for a description of the trade-mark itself only when needed to express colors not shown in the drawing.

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"Inasmuch as the trade-mark covered by this application cannot be registered until after July 1, 1906, when said act takes effect, applicant should direct the cancellation of the present description and of all of the preamble to the statement following the words 'have adopted for my use,' and the substitution therefor of the following words: '*the trade-mark shown in the accompanying drawing.*'

"If colors form a material part of the mark, a brief reference thereto should follow.

"An amendment as above indicated should be promptly filed to avoid delay in the use of the certificate."

Plaintiffs refused to comply with this suggestion, and, on July 16, 1906, the examiner declined to pass the application for registration.

A petition was thereupon presented by plaintiffs to the Commissioner, seeking the overruling of the action of the examiner, and, on November 22, 1906, the petition was denied.

An appeal was prosecuted to the Court of Appeals, which affirmed the decision of the Commissioner of Patents, and directed the clerk to "certify this opinion to the Commissioner of Patents, according to law."

An appeal and a writ of error were allowed.

Mr. Chester Bradford, with whom *Mr. Arthur M. Hood* and *Mr. E. W. Bradford* were on the brief, for appellant and plaintiff in error:

This court has jurisdiction of this case, which is not governed by the cases of *Gaines* v. *Knecht*, *post*, p. 561, and *Frasch* v. *Moore*, 211 U. S. 1. In order that a case may be brought here from the Court of Appeals of the District of Columbia, two conditions must concurrently exist: There must be a final judgment or decree, and a subject-matter defined by the statute must exist. Both these conditions exist in the case at bar. They did not exist in the cases above cited, which are clearly distinguishable. In the *Gaines case* and *Frasch case* there was no final judgment or decree upon the matter sought

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to be reviewed, and there was therefore no statutory authority for bringing the cases to this court.

Those cases are not authorities in this case also, because the decision in this case was final, and there is no other means by which appellant and plaintiff in error can secure relief if it be denied here. The decision of the Commissioner, sustaining the ruling of the examiner, as affirmed by the Court of Appeals, was final, and binding upon the applicant. There is no other proceeding known to the law than that which has been adopted in coming to this court by which these actions may be reviewed.

When the appeal was taken and the writ of error sued out, it was supposed that the case of *Steinmetz* v. *Allen*, 192 U. S. 543, was sufficient authority for the proceeding. That was a case brought here from the same tribunal and under the same section of the statute, and in that case this court expressly held that it had jurisdiction. See also: *Bernardin* v. *Duell*, 172 U. S. 576; *Butterworth* v. *Hoe*, 112 U. S. 50. The cases cited by appellee and defendant in error can be distinguished.

Mr. Assistant Attorney General Fowler for appellee and defendant in error:

This court is without jurisdiction for two reasons: First. The judgment of the Court of Appeals is not final within the meaning of § 8 of the act of February 9, 1893, 27 Stat. 436; Code Dist. Col., § 233, which specifies what judgments of that court may be reviewed by this court on appeal or writ of error. The manifest purpose of § 9 of the Trade-Mark Act of February 20, 1905, 33 Stat. 727, was to place appeals to the Court of Appeals from decisions of the Commissioner of Patents in proceedings arising under applications for trade-marks, and also the judgments of that court upon such appeals, upon the same footing with such appeals to and judgments thereof in applications for patents. See *Frasch* v. *Moore*, 211 U. S. 1, and *Gaines* v. *Knecht*, *post*, p. 561. Second. Because the matter in dispute is of no certain value and there is not drawn in question

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"the validity of . . . a statute of, or an authority exercised under the United States."

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

In *Frasch* v. *Moore*, 211 U. S. 1, it was held that decisions in the Court of Appeals of the District of Columbia in appeals from the Commissioner of Patents under § 9 of the act of February 9, 1893, c. 74, 27 Stat. 434, were interlocutory and not final, and not reviewable by this court under § 8 of that act, because not final judgments or decrees within the meaning of that section. When certified to the Commissioner of Patents, they "govern the further proceedings in the case," (Revised Statutes, § 4914), but are not final judgments or decrees at law or in equity within the purview of § 8.

In *Gaines & Company* v. *Knecht & Son*, *post*, p. 561, we applied the same rule to a writ of error to the decision of the Court of Appeals, rendered on appeal to that court from a decision of the Commissioner of Patents in proceedings arising under an application for a trade-mark, contenting ourselves with this memorandum, announced December 14, 1908:

"Writ of error dismissed for want of jurisdiction. *Frasch* v. *Moore*, 211 U. S. 1; see Act of February 20, 1905, for the registration of trade-marks, 33 Stat. 724, c. 592, sections 9, 16, 17, 18 *et passim*."

Section 9, there referred to, provides:

"That if an applicant for registration of a trade-mark . . . is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the Court of Appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for a patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings as far as the same may be applicable."

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Gaines v. *Knecht* was a case of opposition to the registration of a trade-mark under §§ 6 and 7 of the act of February 20, 1905, the objections being that the act was unconstitutional, and also that the applicant's mark was so similar to the mark of opponent that it would be likely to lead to confusion, and enable applicant to perpetrate a fraud on the public. The examiner of interferences dismissed the opposition, and from his decision the case was appealed to the Commissioner, who affirmed the decision. An appeal was then taken to the Court of Appeals, and that court affirmed the Commissioner, and "ordered that this decision and the proceedings in this court be certified to the Commissioner of Patents, as required by law." The court said, among other things, that the appeal was "an appeal from the decision of an officer of the executive department performing a ministerial act. He has treated the statute as valid, and so he ought to have treated it until it is otherwise determined by the courts. . . . It may be true that the Commissioner acts in a judicial capacity in determining whether the applicant is the owner of the trade-mark, and whether it is one of those marks the registration of which is prohibited, but when he has determined these in favor of the applicant the act to be performed by him is ministerial merely, and that is the act which it is claimed he should have refused to perform, on the ground that the statute is unconstitutional. Such judicial proceedings as there are issue and culminate in a purely ministerial act—the mere registration of a mark which, if the statute is void, cannot possibly prejudice the right of the opponent or of any one else. It is not as if the culminating act interfered with the person or property of others. We sit to review the action of the officer from the same standpoint which he was bound to take. Although the case is now before a court, the case itself is not changed, nor are the rules changed by which it should be decided. It is for this court to say merely whether his decision was right or wrong. We think he did not err in treating the act as valid. When some case shall arise in which rights of person or property must be affected by the de-

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cision it will become necessary to consider the question now attempted to be raised; but to pass upon it now would be to decide a question of theory alone, and this is not the province of a court." 27 App. D. C. 530, 532.

In the light of the various details of the act of February 20, 1905, and of the specific provisions of § 9, we were of opinion that proceedings under the act were governed by the same rules of practice and procedure as in the instance of patents, and the writ of error was accordingly dismissed. The same result must follow in the present case.

Under § 4914 of the Revised Statutes no opinion or decision of the Court of Appeals on appeal from the Commissioner precludes "any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question," and by § 4915 a remedy by bill in equity is given where a patent is refused, and we regard these provisions as applicable in trade-mark cases under § 9 of the act of February 20, 1905.

Appeal and writ of error dismissed.

LAUREL OIL AND GAS COMPANY v. MORRISON.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 198. Argued October 14, 1908.—Decided February 23, 1909.

Where a statute provides for an appeal or a writ of error to a specific court it must be regarded as a repeal of any previous statute providing for an appeal or a writ of error to another court. *Brown* v. *United States*, 171 U. S. 631.

Decisions of the Court of Appeals of the United States for the Indian Territory are final except as made subject to review by some express statutory provision.

The provisions in § 12 of the act of March 3, 1905, c. 1479, 33 Stat. 1081, for appeals and writs of error from the United States courts in Indian

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Territory to the United States Court of Appeals in the Indian Territory, and from that court to the United States Circuit Court of Appeals for the Eighth Circuit are exclusive; and there is now no appeal or writ of error in such cases from the Circuit Court of Appeals of the Eighth Circuit to this court.

Appeal from 154 Fed. Rep. 617, dismissed.

THIS case on the merits is reported in *sub nomine Morrison* v. *Burnette*, 154 Fed. Rep. 617. The able opinion of Sanborn, J., speaking for the Circuit Court of Appeals, is preceded by the following statement, which correctly sets forth the facts:

"Pursuant to an order of the United States Court in the Western District of Indian Territory, which has the jurisdiction of a Probate Court, a lease of 160 acres of mineral land which had been allotted to Edith Durant, a minor Indian, was advertised for sale on sealed bids by Monday Durant, her guardian, and on the day of sale, March 5, 1906, the highest bonus bid for it was $3,490, and this bid was made by Robert W. Morrison, Charles W. S. Cobb, John E. McKinney, William J. Breene and Frank M. Breene, who are now the appellants in this case, and will hereafter be so styled. The Laurel Oil & Gas Company, a corporation, one of the appellees, bid at the same time at this sale $2,850 for this lease. On March 7, 1906, the appellants deposited the $3,490 with the court, and on March 9, 1906, the guardian executed the lease of the land to the appellants and they applied to the court for the confirmation of the sale and the approval of the lease. After notice to all parties in interest and a hearing the court on June 11, 1906, 'ordered, adjudged and decreed that the lease executed by Monday Durant, guardian of Edith Durant, minor, on the ninth day of March, 1906, (to the appellants,) be, and the same is hereby in all things approved, ratified and confirmed.' On the next day the Laurel Company, the unsuccessful bidder at the former sale, made a motion for leave to bid again for the lease of this land, and offered to bid a bonus of $8,000. Thereupon the court set aside the order of June 11, 1906, for the sole reason that a higher bonus could be obtained, and on June 14,

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1906, it sold a lease of 80 acres of this land on the same terms as the former to the Galbraith Oil & Gas Company for a bonus of $16,800 and a lease of the other eighty acres on the same terms to the Laurel Oil & Gas Company for $2,000. The leases to these parties were subsequently made by the guardian and the court confirmed these sales and approved these leases. The appellants then sued out a writ of error from the Court of Appeals of the Indian Territory to reverse the order which set aside the decree of confirmation of the sale and of approval of the lease to them, and they also appealed from that order. The Court of Appeals of the Indian Territory consolidated the two cases, heard them as an appeal in equity and affirmed the order below because the court was evenly divided in opinion. The appellants have brought the latter judgment here by writ of error and also by appeal.

"Since the case came to this court the controversy over the eighty acres leased to the Galbraith Oil & Gas Company has been settled and the only dispute remaining relates to the eighty acres leased to the Laurel Oil & Gas Company under the second lease."

The question in the case was whether a court of equity during the term at which the confirmation is made may lawfully avoid an executed judicial sale which it has confirmed, on the sole ground that a larger price may be obtained by a second sale, and was answered in the negative, and the decree was that the decree of the United States Court of Appeals in the Indian Territory and the decree of the United States court for the Western District of the Indian Territory be reversed, and that "this cause be, and the same is hereby, remanded to the United States Court for the Western District of the Indian Territory, with directions to confirm and enforce its order and decree which confirmed the sale and approved the lease to the appellants [appellees here], and to take any further proceedings necessary to that end." This decree was made and entered July 10, 1907. An appeal was thereupon allowed to this court, where the record was filed October 31 of that year.

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Mr. George A. Murphey, with whom *Mr. William T. Hutchings* and *Mr. Wm. P. Z. German* were on the brief, for appellant.

Mr. William J. Breene and *Mr. John J. Shea*, with whom *Mr. Edmond C. Breene* was on the brief, for appellees.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

By the act of Congress, approved March 1, 1889, c. 333, 25 Stat. 783, there was established a United States court for the Indian Territory. The act conferred no jurisdiction over felonies, but by the fifth section exclusive original jurisdiction was conferred over all offenses against the laws of the United States committed within the Indian Territory, not punishable by death or by imprisonment at hard labor. Jurisdiction was conferred in all civil cases between citizens of the United States who are residents of the Indian Territory where the value of the thing in controversy amounted to one hundred dollars or more. The final judgment or decree of the court, where the value of the matter in dispute, exclusive of costs, exceeded one thousand dollars, might be reviewed and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court.

By section five of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, as amended, appeals or writs of error might be taken from the District and Circuit Courts directly to this court in cases in which the jurisdiction of the court was in issue; of conviction of a capital crime; involving the construction or application of the Constitution of the United States; and in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question.

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By section six, the Circuit Courts of Appeals established by the act were invested with appellate jurisdiction in all other cases.

The thirteenth section read: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States Court in the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the Eighth Circuit, in the same manner and under the same regulations as from the Circuit or District Courts of the United States, under this act."

The act of March 1, 1895, c. 145, 28 Stat. 693, provided for the appointment of additional judges of the United States court in the Indian Territory, and created a Court of Appeals with such superintending control over the courts in the Indian Territory as the Supreme Court of Arkansas possessed over the courts of that State by the laws thereof; and the act also provided, § 11, that "writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States," which thus in terms deprived that court of jurisdiction of appeals from the Indian Territory trial court, under § 13 of the act of 1891.

In *Harless* v. *United States*, 88 Fed. Rep. 97, the Circuit Court of Appeals for the Eighth Circuit, in a careful opinion by District Judge Shiras, held that in the act of March 1, 1895, creating the Court of Appeals for the Indian Territory and giving it full jurisdiction, civil and criminal, the provision of § 11, that "writs of error and appeals from the final decisions of said appellate court shall be allowed and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States," conferred upon that court full appellate jurisdiction over the final decisions of the territorial appellate court, which jurisdiction was not in any way measured or limited by the jurisdiction on ap-

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peal from or error to the District or Circuit Courts. And we concur in that view.

The rule was laid down by this court in *Brown* v. *United States*, 171 U. S. 631, that where a statute provides for a writ of error to a specific court of appeals it must be regarded as a repeal of any previous statute which provided for a writ of error to another and different court, and that the decisions of the Court of Appeals of the United States for the Indian Territory are final, except so far as they are made subject to review by some express provision of law. It was furthermore there ruled that the Court of Appeals in the Indian Territory was analogous to the Supreme Court of the District of Columbia, and bore the same relation to the trial court in the Indian Territory as the Supreme Court of the District of Columbia bore to the trial court in the District, and *Ex parte Bigelow*, 113 U. S. 328; *In re Heath*, 144 U. S. 92; *Cross* v. *Burke*, 146 U. S. 82, 84, were cited to the point that no appeal could be taken from or writ of error sued out to the Supreme Court of the District of Columbia where not specifically provided for.

Section 12 of the act of March 3, 1905, 33 Stat. 1081, c. 1479, in force when the proceedings in the present case were had, provides:

"That hereafter all appeals and writs of error shall be taken from the United States courts in the Indian Territory to the United States Court of Appeals in the Indian Territory, and from the United States Court of Appeals in the Indian Territory to the United States Circuit Court of Appeals for the Eighth Circuit in the same manner as is now provided for in cases taken by appeal or writ of error from the Circuit Courts of the United States to the Circuit Court of Appeals of the United States for the Eighth Circuit."

We find no statute giving an appeal from that Circuit Court of Appeals to this court, and perceive no reason for concluding that Congress intended that parties in such cases should be entitled to three appeals.

Appeal dismissed.

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JURAGUA IRON COMPANY, LIMITED, v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 34. Argued December 2, 3, 1908.—Decided February 23, 1909.

No action can be maintained against the United States for the destruction or taking of property under the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, unless the United States is bound by express or implied contract to compensate the owner therefor or unless the case be one not sounding in tort.

Under the recognized rules of war Cuba, being a part of Spain, was during the war of 1898–9, enemy country; and all persons residing in Cuba pending the war were to be deemed enemies whatever their nationality, including citizens of the United States there domiciled and doing business.

Property of citizens of the United States in Cuba was during the war with Spain to be regarded as enemy property subject to the laws of war, and to be destroyed whenever military necessity so demanded; nor could a citizen of the United States invoke the protection of the Constitution pending the war for his property in Cuba any more than could a Spanish subject.

A citizen of the United States domiciled in Cuba cannot maintain an action against the United States under the act of March 3, 1887, in the Court of Claims for the value of property destroyed during, and as the result of, military operations in Cuba by order of the commanding officer in the field as there is no obligation based on implied contract to compensate for the value of such property. If the order was not justified by the rules of war it would amount to a tort, and the action based thereon would be one sounding in tort, and the action cannot be maintained.

Quare, and not decided, whether the act of March 3, 1887, c. 359, 24 Stat. 505, supersedes or modifies § 1066, Rev. Stat., and § 9 of the act of March 3, 1863, c. 92, 12 Stat. 767, relating to claims against the United States growing out of, or dependent on, treaty stipulations.

42 C. Cl. 99, affirmed.

THE facts are stated in the opinion.

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Mr. Frederic D. McKenney and *Mr. John Spaulding Flannery*, with whom *Mr. Wayne MacVeagh* and *Mr. William Hitz* were on the brief, for appellant:

The war with Spain was not against Cuba nor against the Cuban people, nor against aliens domiciled or found within its borders and there engaged in the peaceful pursuits of commerce. It was a war solely against Spain, undertaken by the United States because of the abhorrent conditions which had been brought about in Cuba by Spain and which could not longer be endured. It was undertaken by the United States in the interest of Cuba and on behalf of her peoples, and because those people were and of right ought to be free and independent, and because it was the duty of the United States to demand that the government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. See *Neely* v. *Henkel*, 180 U. S. 109.

But even if this were not all so, and if the mere *situs* of the claimants' property within the territorial sovereignty of the enemy stamped it as "enemy property," nevertheless, under well-recognized principles of modern international law, as well as under the modern military law governing the armies of the United States in the field, and binding as well upon the Government as upon those who become subject to its power, the Juragua Iron Company became and is entitled to compensation for its property so seized and destroyed. Article 38, § 11, General Orders, No. 100; General Orders, No. 101.

General Orders, No. 101, promulgated through the War Department by President McKinley, did not announce any new principle either of law or liability. It merely reiterated certain well-understood principles of international law, founded in equity and moral right and accepted and acted upon by all civilized nations. It was scarcely more than a reiteration in condensed form, of Lieber's instructions, as proclaimed by direction of President Lincoln in 1863 in General Orders, No. 100; afterwards adopted by the United German Empire

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for the government and regulation of its armies; formulated into a code by Bluntschli; made the basis of the Brussels agreement of 1879; adopted by The Hague convention of 1899 and latterly reannounced, practically in its original form in The Hague convention of 1907 "with respect to the laws and customs of war on land," to the last two of which conventions the United States has formally indicated their adherence. See *Hilton* v. *Guyot*, 159 U. S. 113, 163; *Fremont* v. *United States*, 17 How. 542, 557; *The Scotia*, 14 Wall. 170, 188; *Respublica* v. *De Longchamps*, 1 Dall. 111, 116; *Moultrie* v. *Hunt*, 23 N. Y. 394, 396; *The Paquete Habana*, 175 U. S. 677, 700, 701.

The obligation of a belligerent to pay for private property taken or destroyed under circumstances not involving actual military operations—that is, in battle, or the course of bombardment, and the like—is recognized and declared by practically all text-writers who have treated of the subject. Kent's Commentaries, 92, 93; Hall's International Law, 441, 442; 2 Halleck's International Law, 68; Treatise on International Law, by Cushman K. Davis, 144–146. See also dissenting opinion of Commissioner Maury (Spanish Treaty Claims Commission) in case of *Juragua Iron Co.* v. *United States; Mitchell* v. *Harmony*, 13 How. 115; *McKenna* v. *Fisk*, 1 How. 241; *United States* v. *Russell*, 13 Wall. 623; *United States* v. *Pacific R. R. Co.*, 120 U. S. 227; *Putegnat Heirs* (Mexican Claims Commission), 4 Moore's International Arbitrations, 3718; *Grant* v. *United States*, 1 C. Cls. 41; *United States* v. *Lynah*, 188 U. S. 445.

Mr. Assistant Attorney General Thompson, for appellee:

Under stress of military necessity, invading forces may use or destroy both public and private property for purposes of prosecuting war, provided that they do not commit wanton damage. The property of a foreigner situated within a state where military operations are being pressed becomes an element of strength to the state and may be treated as hostile by an enemy. Hall's International Law (5th ed.), pp. 471, 472, 474, 481; War Power under the Constitution, by William Whit-

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ing (2d ed.), p. 342; 2 Halleck's International Law, pp. 75–77; *The Cheshire*, 3 Wall. 233; *The Gray Jacket*, 5 Wall. 369, 370; *Miller* v. *United States*, 11 Wall. 305, 306; *Lamar* v. *Browne*, 92 U. S. 187, 194; *Dow* v. *Johnson*, 100 U. S. 170; *Hijo* v. *United States*, 194 U. S. 315; *United States* v. *Pacific R. R.*, 120 U. S. 228; *The Venice*, 2 Wall. 258; *The Venus*, 8 Cranch, 277; *Bagaley*, 5 Wall. 408; *Young* v. *United States*, 97 U. S. 60; *Hamilton* v. *Dillon*, 21 Wall. 94.

Any standing this appellant may have in the Court of Claims or in this court must find its basis and authority in the first section of what is commonly termed the Tucker Act, of March 3, 1887, to provide for the bringing of suits against the Government of the United States. 24 Stat. 505.

The claim in this case is not founded on the Constitution of the United States or on any act of Congress; neither does it find its basis in any regulation of an executive department, nor can it be said to be founded on a contract, either expressed or implied. Indeed, there is no element of contract in the case, for nothing was done by the United States nor anything said by any of its officers from which could be implied an agreement or obligation on the part of the Government to pay for the property destroyed. See *Hijo* v. *United States*, 194 U. S. 315.

This appellant company having established a commercial domicil in Spanish territory, such as has been shown by the facts in this case, certainly is not entitled to recover under the plea of implied contract for property destroyed under such circumstances as set forth in the record.

There is no provision in the act of March 3, 1887, whereby appellant can successfully maintain its action. The seizure and destruction may have made a case sounding in tort, but it is not one of contract, either expressed or implied.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought in the Court of Claims to recover from the United States the alleged value of certain property

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destroyed in Cuba, during the war with Spain, by order of the officer who at the time of its destruction commanded the troops of the United States operating in the locality of the property.

The case depends altogether upon the facts found by the court. We cannot go beyond those facts.

The Court of Claims found that the Juragua Iron Company (Limited) was a corporation of Pennsylvania, having its principal office and place of business in Philadelphia and was and for many years had been engaged in the business of mining and selling iron ore and other mineral products in the United States, Cuba and elsewhere and in manufacturing iron and steel products; that it was so engaged at the opening of the late war with Spain; and to enable it to carry on business it owned, leased and operated mines in Cuba, maintaining offices, works and the necessary tools, machinery, equipments and supplies for its business in the Province of Santiago de Cuba, at or near Siboney, Firmeza and La Crux; that in addition to its mines, works and their equipments, the company also owned real estate at or near Siboney, which was improved by 66 buildings of a permanent character, used for the purposes of its business and occupied by its employés as dwellings and for other purposes; that in the year 1898, and "while the war with Spain was in progress, the lives of the United States troops who were engaged in military operations in the Province of Santiago de Cuba, in the belligerent prosecution of the war, became endangered by the prevalence of yellow fever, and it was deemed necessary by the officers in command, in order to preserve the health of the troops and to prevent the spread of the disease, to destroy all places of occupation or habitation which might contain the fever germs;" that on or about the eleventh of July, 1898, General Miles, commanding the United States forces in Cuba, because of the necessity aforesaid and by the advice of his medical staff, issued orders to destroy by fire these 66 buildings at Siboney, which belonged to the claimant and had been used for the purposes aforesaid; that pursuant to that order such buildings and their contents were destroyed by fire by the military authorities of

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the United States; that the reasonable value of the buildings at the time and place of destruction was $23,130, and the reasonable value of the drills, furniture, tools and other personal property so destroyed by fire was seven thousand nine hundred and eighty-six dollars ($7,986), making a total of thirty-one thousand one hundred and sixteen dollars ($31,116).

As a conclusion of law the court found that the United States was not liable to pay any sum to the plaintiff on account of the damage aforesaid and dismissed the petition.

It is to be observed at the outset that no fact was found that impeached the good faith, either of General Miles or of his medical staff, when the former, by the advice of the latter, ordered the destruction of the property in question; nor any fact from which it could be inferred that such an order was not necessary in order to guard the troops against the dangers of yellow fever. It is therefore to be assumed that the health, efficiency and safety of the troops required that to be done which was done. Under these circumstances was the United States under any legal obligation to make good the loss sustained by the owner of the property destroyed?

By the act of March 3d, 1887, providing for the bringing of suits against the Government of the United States the Court of Claims was given jurisdiction to hear and determine all claims "founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department or upon any contract, expressed or implied, with the Government of the United States or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of equity or admiralty if the United States were suable. 24 Stat. 505, c. 359.

Manifestly, no action can be maintained under this statute unless the United States became bound by *implied* contract to compensate the plaintiff for the value of the property destroyed, or unless the case—regarding it as an action to recover damages—be one "*not* sounding in *tort*."

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The plaintiff contends that the destruction of the property by order of the military commander representing the authority and power of the United States was such a taking of private property for public use as to imply a constitutional obligation, on the part of the Government, to make compensation to the owner. Const. Amend. V. In support of that view it refers to *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656; *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 597-8; *United States* v. *Lynah*, 188 U. S. 445. Let us examine those cases.

United States v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656, was a case of the taking for public use by agents and officers of the United States proceeding under the authority of an act of Congress of certain private property—lands, water rights and privileges—which were held and used by the Government for nearly twenty years, without any compensation being made to the owner. A suit was brought against the United States in the Court of Claims, and judgment was rendered for the claimant. This court said: "It seems clear that these property rights have been held and used by the agents of the United States under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the Government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the Nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing in some way payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking un-

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der its sovereign right of eminent domain, demand just compensation. *Kohl* v. *United States*, 91 U. S. 367, 374. In that view we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.'"

In reference to the subsequent case of *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 597, it may be said that so far as it has any bearing upon the present controversy it reaffirms the principle announced in *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656. The court said: "It is sufficient to say that the record discloses nothing showing that he [the Secretary of War] has taken more land than was reasonably necessary for the purposes described in the act of Congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the Government is under a constitutional obligation to make compensation for any property or property right taken, used, and held by him for the purposes indicated in the act of Congress, whether it is embraced or described in said survey or map, or not. . . . Even if the Secretary's survey and map, and the publication of the Attorney General's notice did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the Government recognizes and

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retains the possession taken in its behalf for the public purposes, indicated in the act under which its officers have proceeded."

In *United States* v. *Lynah*, 188 U. S. 445, 464–5, which involved the inquiry whether the injury done to certain lands as the result of work done on the Savannah River by the United States was a taking of private property for public use, the court said: "The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. . . . So the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation. . . . Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor."

It is clear that these cases lend no support to the proposition that an implied *contract* arose on the part of the United States to make compensation for the property destroyed by order of General Miles. The cases cited arose in a time of peace and in each it was claimed that there was within the meaning of the Constitution an actual taking of property for the use of the United States, and that the taking was by authority of Congress. That taking, it was adjudged, created by implication an obligation to make the compensation required by the Constitution. But can such a principle be enforced in respect of property destroyed by the United States in the course of military operations for the purpose, and only for the purpose, of protecting the health and lives of its soldiers actually engaged at the time in war in the enemy's country? We say "enemy's country" because, under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there were, pending such war, to be

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deemed enemies of the United States and of all its people. The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject under the laws of war to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy.

In *Miller* v. *United States*, 11 Wall. 268, 305, the court, speaking of the powers possessed by a nation at war, said: "It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is the right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality." In *Lamar's Ex'r* v. *Browne*, 92 U. S. 187, 194, the court said: "For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies." "All property within enemy territory," said the court in *Young* v. *United States*, 97 U. S. 39, 60, "is in law enemy property, just as all persons in the same territory are enemies. A neutral owning property within the enemy's lines holds it as enemy property, subject to the laws of war; and if it be hostile prop-

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erty, subject to capture." Referring to the rules of war between independent nations as recognized on both sides in the late Civil War, the court, in *United States* v. *Pacific Railroad Co.*, 120 U. S. 227, 233, 239, said: "The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. . . . The inhabitants of the Confederate States on the one hand and of the States which adhered to the Union on the other became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other. *Brown* v. *Hiatts*, 14 Wall. 177, 184. . . . More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government. By the well-settled doctrines of public law it was not responsible for them. . . . The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the Government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, 'a matter of bounty rather than of strict legal right.'" See also *The Venus*, 8 Cranch, 253, 278; *The Venice*, 2 Wall. 258, 275; *The Cheshire*, 3 Wall. 231, 233; *The Gray Jacket*, 5 Wall. 342, 345, 369; *The Friendschaft*, 4 Wheat. 105, 107; *Griswold* v. *Waddington*, 16 Johns. 438, 446-7; Vattel, b. 3, c. 5, § 70, and c. 4, § 8; Burlamaqui, Pt. 4, c. 4, § 20.

So in Hall's International Law, 5th ed., 500, 504, 533: "A person though not a resident in a country may be associated with it through having or being a partner in a house of trade as to be affected by its enemy character, in respect at least of the

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property which he possesses in the belligerent territory." In Whiting's War Powers Under the Constitution, 340, 342, the author says: "A foreigner may have his personal or permanent domicile in one country, and at the same time his constructive or mercantile domicile in another. The national character of a merchant, so far as relates to his property engaged in trade, is determined by his commercial domicile. 'All such persons . . . are *de facto* subjects of the enemy sovereign, being residents within his territory, and are adhering to the enemy so long as they remain within his territory.' . . . A neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation."

In view of these principles—if there were no other reason—the plaintiff corporation could not invoke the protection of the Constitution in respect of its property used in business in Cuba, during the war, any more than a Spaniard residing there could have done, under like circumstances, in reference to his property then in that island. If the property destroyed by order of General Miles had belonged at the time to a resident Cuban, the owner would not have been heard in any court, under the facts found, to claim, as upon implied contract, compensation from the United States on account of such destruction. How then under the facts found could an obligation, based on implied contract, arise under the Constitution in favor of the plaintiff, an American corporation, which at the time and in reference to the property in question had a commercial domicil in the enemy's country? It is true that the army, under General Miles, was under a duty to observe the rules governing the conduct of independent nations when engaged in war—a duty for the proper performance of which the United States may have been responsible in its political capacity to the enemy government. If what was done was in conformity to those rules—as upon the facts found we must assume that it was—then the

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owner of the property has no claim of any kind for compensation or damages; for, in such a case the Commanding General had as much right to destroy the property in question if the health and safety of his troops required that to be done, as he would have had if at the time the property had been occupied and was being used by the armed troops of the enemy for hostile purposes. In the circumstances disclosed by the record it cannot reasonably be said that there was, in respect of the destruction of the property in question, any "convention between the parties," any "coming together of minds," or any circumstances from which a *contract* could be implied. *Russell* v. *United States*, 182 U. S. 516, 530; *Harley* v. *United States*, 198 U. S. 229, 234. Again, if, as contended—without, however, any basis for the contention—the acts of that officer were not justified by the laws of war, then the utmost that could be said would be that what was done pursuant to his order amounted to a tort, and a claim against the Government for compensation on account thereof would make a case "sounding in tort." But of such a case the court would, of course, have no jurisdiction under the act of Congress.

In this connection we may refer to *Hijo* v. *United States*, 194 U. S. 315, 322, in which the United States was sued by a Spanish corporation for the value of the use of a merchant vessel taken by the United States in the port of Porto Rico, when that city was captured by our army and navy on July 28th, 1898, and kept and used by the Quartermaster's Department for some time thereafter. The court said: "There is no element of contract in the case; for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. According to the established principles of public law, the owners of the vessel being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for the purposes of war, and not for any purposes of gain."

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After observing that the case did not come within the principle announced in *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656, the court proceeded: "The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort, because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. . . . If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract, because of the retention and use of the vessel pending negotiations for a treaty of peace."

In our judgment there is no element of contract in the claim of the plaintiff. And even if it were conceded that its property was wrongfully and unnecessarily destroyed under the order of the general commanding the United States troops, the concession could mean nothing more, in any aspect of the case, than that a tort was committed by that officer in the interest of the United States. But, as already said, of a cause of action arising from such a tort the Court of Claims could not take cognizance, whatever other redress was open to the plaintiff.

It may be well to notice one other matter referred to in argument. Section 1066 of the Revised Statutes provided that the jurisdiction of the Court of Claims "shall not extend to any claim against the Government not pending therein on December 1st, 1862, growing out of or dependent on treaty stipulations entered into with foreign nations or with the Indian tribes." Act of March 3, 1863, 12 Stat. 767, c. 92, § 9. We need not now consider or definitely determine whether that section was superseded or modified by the above act of March 3, 1887; for, if it was, and if an implied contract could in any case arise from a treaty stipulation, there is nothing in any treaty with Spain

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which stood in the way of the destruction of the buildings in question under the circumstances stated in the findings without liability on the part of the United States for their value; and if that section was not superseded or modified, then the law is for the United States, because of the absence of any implied contract entitling the plaintiff, under the facts found, to be compensated for the loss sustained by it.

Having noticed all the questions that require consideration and finding no error in the record, the judgment of the Court of Claims must be affirmed.

It is so ordered.

AMERICAN EXPRESS COMPANY v. MULLINS.

ERROR TO THE CIRCUIT COURT OF KENTON COUNTY, STATE OF KENTUCKY.

No. 77. Argued January 14, 15, 1909.—Decided February 23, 1909.

Where in the state court defendant distinctly claimed that a recovery would be prevented if full faith and credit were given to a judgment of the courts of another State, and this claim is expressly denied, this court has jurisdiction to review under § 709, Rev. Stat.

The duty of the carrier to safely carry and promptly deliver to the consignee the goods entrusted to it does not require it to forcibly resist judicial proceedings in the courts of the State into or through which the goods are carried.

While the carrier may appear and contest the validity of a seizure under judicial process of goods in its custody, if it seasonably notify the owner and call upon him to defend, it is relieved from further responsibility; and, in absence of fraud or connivance on its part, it may plead the judgment rendered against it as a bar in an action brought by the owner.

Where the state court has sustained a demurrer to an answer which set forth a complete defense in the absence of fraud, connivance or consent on defendant's part, this court will determine for itself from the record whether the record shows any fraud, connivance or consent.

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A judgment is conclusive as to all *media concludendi* and cannot be impeached in or out of the State by showing it was based on mistake of law. *Fauntleroy* v. *Lum*, 210 U. S. 230.

DEFENDANT in error brought his action in the Circuit Court of Kenton County, Kentucky, against the plaintiff in error to recover the value of twenty packages of whisky which he had delivered to the company at Covington, Kentucky, on March 10, 1904, to carry C. O. D. to Oswego, Labette County, Kansas. Each package was consigned to a separate consignee. The petition alleged that the defendant failed to deliver the whisky, or to collect the money therefor, or to return the whisky to the plaintiff. The answer was in effect that the company carried the whisky to Oswego, where it was seized and taken out of its possession by the sheriff of the county, under a warrant with seizure clause attached, duly issued by the District Court of the county, and that it was destroyed in pursuance of a judgment duly rendered by that court. It further alleged that the District Court had full jurisdiction in the premises, and was authorized to issue the warrant, and that it was valid on its face; that a notice was duly issued out of the court notifying any and all persons claiming any interest in the whisky to appear at a day and hour named to answer the complaint made against the whisky, and show cause why it should not be forfeited and destroyed; that this notice was served on the company, and a true copy posted in its office where the whisky was seized; that the company promptly notified plaintiff of the seizure, and served on him a copy of the notice issued by the court, and that he acknowledged receipt thereof fifteen days before the day set for answer, and advised the company that he intended to contest the legality of the seizure. A copy of the proceedings in the Kansas court was attached to the answer as an exhibit.

The answer further claimed that the judgment of the District Court of Kansas was entitled to full faith and credit under the Constitution and laws of the United States. A demurrer was sustained to the answer, and the company declining to plead further, judgment was rendered against it for the value of the

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whisky. The Circuit Court of Kenton County is the highest court of the State in which a decision could be had. Kentucky Statutes, 1903, § 950.

Mr. Joseph S. Graydon, with whom *Mr. Lawrence Maxwell, Junior*, and *Mr. Lewis Cass Ledyard* were on the brief, for plaintiff in error.

No counsel appeared, nor was any brief filed, for defendant in error.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

This court has jurisdiction because of the claim distinctly made in the Kentucky court that giving full faith and credit to the judgment of the Kansas court would prevent a recovery against the company, a claim which was expressly denied by the Kentucky court. *Green* v. *Van Buskerk*, 7 Wall. 139, 145; *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 642; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, 293.

While it is the duty of a carrier to safely carry and promptly deliver to the consignee the goods entrusted to its care, yet that duty does not call upon it to forcibly resist the judicial proceedings in the courts of the State into or through which it is carrying them. The company carried the goods to Kansas in obedience to the terms of the shipment. On arrival in that State they were taken by judicial process out of its possession and destroyed, the process being issued in a proceeding in the nature of one *in rem*. Undoubtedly, it was authorized to appear in the Kansas court and contest for the rightfulness of its possession, but it might also notify the owner of the property and call upon him to carry on the litigation. This it did; notified him in time, and received from him an assurance that he would contest the legality of the seizure. This relieved the company from further responsibility, and the owner can no longer complain of it because the judgment of the Kansas court seized and disposed of the property. *Stiles* v. *Davis*, 1

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Black, 101; *Wells* v. *Maine Steamship Company*, 4 Cliff. 228; *Edwards* v. *White Line Transit Company*, 104 Massachusetts, 159; *Bliven* v. *Hudson River R. R. Co.*, 36 N. Y. 403; *Ohio & Mississippi Ry. Co.* v. *Yohe*, 51 Indiana, 181; *Savannah &c. R. R. Co.* v. *Wilcox, Gibbs & Co.*, 48 Georgia, 432; *Railroad Company* v. *O'Donnell*, 49 Ohio St. 489, 501.

In the opinion of the judge of the Kentucky Circuit Court it was said:

"The court is of the opinion that the conduct of the defendant in permitting the goods to be seized and destroyed under a judgment by default, as disclosed by its answer, without defending and asserting its rights as a carrier, which its duty as carrier required it to do, is in effect a fraud, and certainly no judgment suffered to be rendered by the consent, connivance or fraud of the carrier can be relied upon to relieve the person by whose consent, connivance or fraud it was rendered from a legal obligation."

It is undoubtedly true that if the carrier, through connivance or fraud, permits a judgment to be rendered against it, such judgment cannot be invoked by it as a bar to an action brought by the owner of the goods. But there is nothing in the answer, a demurrer to which was sustained, indicating any consent, connivance or fraud, and this court will determine for itself whether there is anything in the record which shows any such consent, connivance or fraud. *Harris* v. *Balk*, 198 U. S. 215.

It was further suggested in the opinion of the judge of the Kentucky court that the Kansas judgment was wrong and in conflict with the decision of this court in *American Express Company* v. *Iowa*, 196 U. S. 133. But as held in *Fauntleroy* v. *Lum*, 210 U. S. 230, 237:

"A judgment is conclusive as to all the *media concludendi*, *United States* v. *California & Oregon Land Co.*, 192 U. S. 355; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of the law."

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We are of opinion that the Circuit Court of Kentucky erred, and its

Judgment is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

NIELSEN v. STATE OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 593. Argued January 18, 19, 1909.—Decided February 23, 1909.

The concurrent jurisdiction given by Congress to the States of Oregon and Washington over the Columbia River, by the acts of March 2, 1853, c. 90, 10 Stat. 172, and of February 14, 1859, c. 33, 11 Stat. 383, extends to civil as well as criminal matters, and is broadly a grant of jurisdiction to each State. *Wedding* v. *Meyler*, 192 U. S. 573.

In determining the effect of a grant of concurrent jurisdiction this court confines itself to the precise questions presented.

Where two States have concurrent jurisdiction, the one first acquiring jurisdiction may prosecute and punish for an act which is *malum in se* and punishable by the laws of both States, and the judgment is a finality so that the person prosecuted cannot be again tried in either State. But this rule does not apply to those acts which are prohibited in only one of the States.

Where two States have concurrent jurisdiction over the same territory which is partly located in one State and partly in the other, one State cannot prosecute a person for an act *malum prohibitum* by its own laws, and which was committed in territory within the other State by authority of the latter; and so held, that one holding a purse net license from the State of Washington cannot be prosecuted for using such net on the Washington side of the Columbia River in the courts of Oregon for violating the statutes of that State prohibiting the use of such nets.

Quære, whether such person could be prosecuted in the courts of Oregon for using such nets on the Oregon side of the river; and *quære* whether, where concurrent jurisdiction exists, prosecutions should be in the name of both States.

95 Pac. Rep. 720, reversed.

PLAINTIFF in error was convicted in a justice's court of the precinct of Astoria, Clatsop County, Oregon, of maintaining

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and operating a purse net on the Columbia River, contrary to the statutes of Oregon. This conviction was, by proper proceedings, taken to the Supreme Court of the State and the judgment affirmed. 95 Pac. Rep. 720. From that decision the case has been brought here on error.

According to the agreed statement of facts, plaintiff in error was an actual and *bona fide* resident and inhabitant of the State of Washington and a citizen of the United States. He had a license from the Fish Commissioner of Washington to operate a purse net on the Columbia River, and was on said river, within the limits of the State of Washington, operating such a purse net at the time he was arrested and prosecuted in the courts of Oregon.

By § 1 of the act of Congress of March 2, 1853, c. 90, 10 Stat. 172, all that part of the Territory of Oregon lying north of the "main channel of the Columbia River" was organized into the Territory of Washington, and by § 21 of the same act it is provided "that the Territory of Oregon and the Territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia River, where said river forms the common boundary between said territories." Section 1 of the act of Congress admitting Oregon into the Union (act of February 14, 1859, c. 33, 11 Stat. 383), after describing in detail the boundaries of the State, provides, "including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State." And in § 2 it is said "the State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon so far as the same shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same."

The legislative assembly of Oregon passed an act, the first section of which is as follows:

"SEC. 1. It shall hereafter be unlawful to operate or main-

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tain within any of the rivers of this State or of the Columbia River, or in the Pacific Ocean within three miles of the mouths of any of the rivers of this State, or of the Columbia River, any purse net or other like seine for the purpose of catching or taking salmon or other anadromous fish or sturgeon."

The second section makes one violating any of the provisions of the act guilty of a misdemeanor, and prescribes the penalty. Sess. Laws Oregon, 1907, p. 154. On the other hand, Washington passed an act (Sess. Laws Wash., 1899, p. 194), the second section of which reads as follows:

"SEC. 2. The use of pound nets, traps, weirs, fish wheels and other fixed appliances, and purse nets, drag seines, and other seines for catching salmon, is hereby authorized in all the waters of this State wherein the same is not prohibited by section 1, subject to the regulation and license hereinafter provided for or otherwise required by law, and the use of the set nets, gill or drift nets, subject to said license and regulation for said purpose, is authorized in all the waters of this State, except as otherwise provided by law. . . ."

The prohibition in section 1 referred to does not include the Columbia River. Section 6 of the same act fixes the license fees for all first-class purse seines at $50 and all second-class purse seines at $25.

Mr. E. C. Macdonald, with whom *Mr. John D. Atkinson*, *Mr. C. C. Fulton*, *Mr. S. H. Piles*, *Mr. W. P. Bell*, *Mr. H. M. Brooks* and *Mr. J. B. Alexander* were on the brief, for plaintiff in error:

The term "concurrent jurisdiction," as used in the act of Congress herein involved, means that the two sovereignties have jurisdiction over common territory when both act in conjunction as to the laws concerning the common territory. That is, when the two States of Washington and Oregon pass the same or similar laws which define what shall be a crime if committed on either the Washington or Oregon side of the Columbia River, then they have enacted concurrent legislation, and

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thereupon the authorities of either State are empowered to enforce its laws by arresting any person who commits a crime on any part of the Columbia River over which the concurrent jurisdiction of the two States lies. But until the two States have passed the same, or similar, laws, neither State can enforce its laws, at least across its boundary, and act within the territorial limits of another State. *In re Mattson*, 69 Fed. Rep. 535, 542; *Ex parte Des Jeiro*, 152 Fed. Rep. 1004; *Roberts* v. *Fullerton*, 117 Wisconsin, 222 (93 N. W. Rep. 1111); *Central R. R. Co. of N. J.* v. *Jersey City* (N. J.), 56 Atlantic Rep. 239.

The State of Oregon cannot arrest and punish one as an offender against her laws who was never, until his arrest, within the State of Oregon, and for an act which he had been specifically authorized to do. The definition of concurrent jurisdiction contended for by the State of Oregon in this case would lead to interminable controversies.

Mr. A. M. Crawford, Attorney General of the State of Oregon, with whom *Mr. I. N. Van Winkle* was on the brief, for defendant in error:

Jurisdiction unqualified, when applied to territory, is the sovereign authority to make, decide on, and execute laws. *Wedding* v. *Meyler*, 192 U. S. 573, 584, 585, approving *Arnold* v. *Shields*, 5 Dana (Ky.), 23; *Daniels* v. *Tearney*, 102 U. S. 415, 418, holding jurisdiction is only "The right to hear and determine." See also *Grignon's Lessee* v. *Astor*, 2 How. 318, 337; *Cornett* v. *Williams*, 20 Wall. 226, 249; Brown on Jurisdiction, 2d ed., § 2; 11 Cyc., p. 659; 2 Rawle's Revision Bouvier's Law Dict. 57; Anderson's Law Dict. 580; 1 Abbott's Law Dict. 671.

When a State or any sovereign power acquires jurisdiction over any territory, and that without conditions or limitations, the sovereign is vested with the authority to make, interpret and execute the laws for that territory.

The words "concurrent jurisdiction," as used in the act admitting Oregon into the Union, mean like authority conferred on each sovereign at the same time, over the same place, ob-

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ject or thing, including the authority to enforce its commands or decrees over the same. Sections 1 and 2, act admitting Oregon, 11 Stat. 383; 1 B. & C. Codes, 73; *Re The Annie M. Smull*, 2 Sawyer, 226; Fed. Cas. No. 423; *Carlisle* v. *State*, 32 Indiana, 55, 56; *Sherlock* v. *Alling*, 44 Indiana, 184, 193; *Iowa* v. *Mullen*, 35 Iowa, 199, 201, 204; *Minnesota* v. *George*, 60 Minnesota, 503, 505; *Wedding* v. *Meyler*, 192 U. S. 573, 581; *Ohio* v. *Stevens*, 2 West. Law Jour. 66, reversed on another point, 4 Ohio, 386; *Arnold* v. *Shields*, 5 Dana (Ky.), 20, 23; *McFall* v. *Commonwealth*, 2 Metcalf (Ky.), 394, 396; *Memphis & Cincinnati Packet Co.* v. *Pikey*, 142 Indiana, 305, 308; *Welsh* v. *State*, 126 Indiana, 71, 74, 75; Rorer on Interstate Law, Ch. 34, Subd. 3, p. 337; 2 Rawle's Revision Bouvier's Law Dict. 57.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

By the legislation of Congress the Columbia River is made the common boundary between Oregon and Washington, and to each of those States is given concurrent jurisdiction on the waters of that river. How that jurisdiction is to be exercised, what limitations there are, if any, upon the power of either State, is not in terms prescribed. It is true in the first section of the act admitting Oregon the jurisdiction was apparently limited to "civil and criminal cases," but in the second section of that act there was given in general terms "concurrent jurisdiction." In *Wedding* v. *Meyler*, 192 U. S. 573, 584, construing the term "concurrent jurisdiction," as given to Kentucky and Indiana over the Ohio River, this court, reversing the Court of Appeals of Kentucky, said:

"Concurrent jurisdiction, properly so-called, on rivers is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. See *Sanders* v. *St. Louis & New Orleans Anchor Line*, 97 Missouri, 26, 30; *Opsahl* v. *Judd*, 30 Minnesota, 126, 129, 130; *J. S. Keator Lumber*

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Company v. *St. Croix Boom Corp.*, 72 Wisconsin, 62, and the cases last cited.

"The construction adopted by the majority of the Court of Appeals seems to us at least equally untenable. It was held that the words 'meant only that the States should have legislative jurisdiction.' But jurisdiction, whatever else or more it may mean, is *jurisdictio*, in its popular sense of authority to apply the law to the acts of men. *Vicat Vocab.*, *sub.* v. See *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 718. What the Virginia compact most certainly conferred on the States north of the Ohio, was the right to administer the law below low-water mark on the river, and, as part of that right, the right to serve process there with effect. *State* v. *Mullen*, 35 Iowa, 199, 205, 206."

Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel. Where an act is *malum in se* prohibited and punishable by the laws of both States, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one State cannot be prosecuted for the same offense in the courts of the other. But, as appears from the quotation we have just made, it is not limited to this. It extends to civil as well as criminal matters, and is broadly a grant of jurisdiction to each of the States.

The present case is not one of the prosecution for an offense *malum in se*, but for one simply *malum prohibitum*. Doubtless the same rule would apply if the act was prohibited by each State separately, but where as here the act is prohibited by one State and in terms authorized by the other, can the one State which prohibits, prosecute and punish for the act done within the territorial limits of the other? Obviously, the grant

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of concurrent jurisdiction may bring up from time to time many and some curious and difficult questions, so we properly confine ourselves to the precise question presented. The plaintiff in error was within the limits of the State of Washington, doing an act which that State in terms authorized and gave him a license to do. Can the State of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that State had specially authorized him to do? We are of opinion that it cannot. It is not at all impossible that in some instances the interests of the two States may be different. Certainly, as appears in the present case, the opinion of the legislatures of the two States is different, and the one State cannot enforce its opinion against that of the other, at least as to an act done within the limits of that other State. Whether, if the act of the plaintiff in error had been done within the territorial limits of the State of Oregon, it would make any difference we need not determine, nor whether, in the absence of any legislation by the State of Washington authorizing the act, Oregon could enforce its statute against the act done anywhere upon the waters of the Columbia. Neither is it necessary to consider whether the prosecution should be in the names of the two States jointly. It is enough to decide, as we do, that for an act done within the territorial limits of the State of Washington under authority and license from that State one cannot be prosecuted and punished by the State of Oregon.

There is little authority upon this precise question, but see *In re Mattson*, U. S. Circuit Court for the District of Oregon, 69 Fed. Rep. 535, and *Ex parte Desjeiro*, same court, 152 Fed. Rep. 1004. See also *Roberts* v. *Fullerton*, 117 Wisconsin, 222; Rorer on Interstate Law, p. 438, and following.

The judgment of the Supreme Court of the State of Oregon is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

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HAMMOND PACKING COMPANY *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 54. Argued February 24, 25, 1908.—Decided February 23, 1909.

The right of a State to prevent foreign corporations from continuing to do business within its borders, is the correlative of its right to exclude them therefrom; and, as this power is plenary, the State, so long as no contract is impaired, may exert it from consideration of acts done in another jurisdiction.

If the power exists to revoke a permit, the question of motive is immaterial for the purpose of determining the constitutionality of the legislative action exerting the power.

The difference between the extent of the power which the State may exert over the doing of business within its borders by an individual, and that which it can exercise as to corporations, furnishes a distinction authorizing a classification between the two which does not violate the equal protection clause of the Fourteenth Amendment.

Where, as in this case, penal provisions as to individuals are separable, and the state court has so construed the statute, any lack of constitutional authority to enact the statute as to individuals would not render the statute unconstitutional as to corporations.

The chartered right of a corporation to do business does not operate to deprive the State of its police power, and the franchise to do business is qualified by the duty to do so conformably to lawful and proper police regulations thereafter enacted.

The claim of an irrepealable contract cannot be predicated upon a contract which is repealable; and, where the reserved power to repeal, alter and amend charters is only to be exercised without injustice, it is within the province of the state court to determine whether it has been so exercised, and its decision cannot be reviewed by this court unless a contract has been impaired or some other and fundamental right within the protection of the Federal Constitution has been denied.

Where the state court has decided that the penal provisions of a statute relate to both domestic and foreign corporations, a foreign corporation cannot claim that the contract between it and the State admitting it, on payment of the franchise tax, to do business on the same

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terms as a domestic corporation has been impaired by the revocation of its permit for violation of such statute. *Am. Smelting Co.* v. *Colorado*, 204 U. S. 403, distinguished.

A state statute requiring corporations to produce books and papers which has been construed by the highest court of the State to the effect that its requirements are satisfied by a *bona fide* effort to comply with its provisions or a reasonable showing of inability to comply therewith is not an arbitrary and unjust exercise of authority repugnant to the due process clause of the Fourteenth Amendment, and so held as to such provisions in the Arkansas Anti-Trust Law.

Relief cannot be afforded by this court to one who violates the provisions of a state statute from an erroneous conception of what the statute requires.

Under the visitorial powers of a State over corporations doing business within its borders it is competent for it to compel such corporations to produce their books and papers for investigation and to require the testimony of their officers and employés to ascertain whether its laws have been complied with, and this power extends to the production of books and papers kept outside of the State, and a statute requiring such production does not amount to an unreasonable search or seizure or a denial of due process of law. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541.

Quære and not decided whether the due process clause of the Fourteenth Amendment embraces in its general terms a prohibition of unreasonable searches or seizures.

An order made pursuant to statute in a suit for penalties for violations of a state anti-trust law requiring a corporation to produce books and papers does not deny due process of law because thereunder the State may elicit proof not only as to the liability of the corporation but also proof in its possession relevant to its defense. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Hale* v. *Henkel*, 201 U. S. 43.

If a state statute requiring the production of papers is constitutional the motive of the State for acting thereunder is immaterial.

Statutory regulations dealing exclusively with persons or property not within the borders of the State, if otherwise valid, are not unconstitutional as denying equal protection of the law. *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84.

The wider scope of the power of the State over corporations than over individuals affords a basis for separate classification as to the production of books and papers.

A state statute requiring corporations to produce, and creating a presumption of fact as to bad faith and untruth of a defense by reason

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of suppression of material evidence, does not deny due process of law; nor does an order of the court based on such a statute striking out the answer of a defendant corporation which has refused to produce material evidence deny due process and condemn him unheard. *Hovey* v. *Elliott*, 167 U. S. 409, in which the order striking the answer from the files was in the nature of a punishment for contempt, distinguished.

81 Arkansas, 519, affirmed.

THE facts, which involve the constitutionality of certain provisions of the anti-trust statute of the State of Arkansas and the validity of proceedings in the courts of the State thereunder, are stated in the opinion.

Mr. John G. Johnson and *Mr. W. E. Hemingway*, with whom *Mr. George B. Rose* and *Mr. Ralph Crews* were on the brief, for plaintiff in error:

Section 1 of the act in question, as construed by the Supreme Court of the State of Arkansas, impairs the obligation of the contract between the defendant as a foreign corporation, and the State, whereby the defendant was permitted to do business within the State; and is therefore violative of § 10, Art. I of the Constitution of the United States. *American Smelting & Refining Co.* v. *Colorado*, 204 U. S. 103; Concurring opinion of Mr. Justice Wood, 100 S. W. Rep. 1099; *Hartford Ins. Co.* v. *State*, 89 S. W. Rep. 42; § 11, art. 12, constitution of Arkansas; §§ 824, 825, 826, 827 and 828, Kirby's Digest Statutes of Arkansas; 15 A. & E. Ency. Law (2d ed.), p. 1049; *Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray, 339; *Washington Bridge Co.* v. *State*, 18 Connecticut, 53; *N. M. Co.* v. *Coon*, 6 Pa. St. 379; *State Tax on Foreign Held Bonds*, 15 Wall. 320; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Wendover* v. *Lexington*, 15 B. Monroe, 258; *Attorney General* v. *Bank of Charlotte*, 4 Jones Equity (N. C.), 293; *Miller* v. *State*, 15 Wall. 497; *Coast Line R. R. Co.* v. *Savannah*, 30 Fed. Rep. 646; *Erie R. R.* v. *Pennsylvania*, 153 U. S. 628; *C., R. I. & P. Ry. Co.* v. *Ludwig, Secy. of State*, 156 Fed. Rep. 152; *Commonwealth* v. *M. & O. R. R. Co.*, 64 S. W. Rep. 452; *Seaboard Air Line R. R. Co.* v.

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R. R. Com. of Alabama, 155 Fed. Rep. 792; *British Am. Mtg. Co.* v. *Jones*, 56 S. E. Rep. 983.

Section 1 of the act in question legislates relating to transactions occurring beyond the limits of the State of Arkansas, and is therefore extra-territorial, and its enforcement would constitute a taking of the property of defendant without due process of law, and constitute a denial to it of the equal protection of the law, contrary to the terms of the Fourteenth Amendment. *Casey* v. *State*, 53 Arkansas, 334; Cooley's Const. Lim. 176; *People* v. *Butler St. Foundry Co.*, 201 Illinois, 236; *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 Fed. Rep. 491; *Cargyle Co.* v. *Minnesota*, 182 U. S. 452; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 409; *Santa Clara Co.* v. *So. Pac. Ry.*, 118 U. S. 394; *Charlotte &c. Ry. Co.* v. *Gibbs*, 142 U. S. 386; *Covington &c. Co.* v. *Stanford*, 164 U. S. 578; *Mo. Pac. Ry.* v. *Mackey*, 127 U. S. 209; *N. Y. Life Ins. Co.* v. *Smith*, 41 S. W. Rep. 687; *Baltimore &c. Ry.* v. *Read*, 62 N. E. Rep. 488.

So much of § 8 of the act as purports to authorize the court to make an order for the production of witnesses, books and papers, is unconstitutional and void, and did not warrant the making of an order in pursuance of its provisions.

It subjects the defendant to unreasonable search and seizure of its books, papers and documents, and thereby violates the Fourth and Fourteenth Amendments to the Constitution of the United States.

It calls upon the defendant to produce evidence to be used against itself in a penal action, and thereby violates the Fifth and Fourteenth Amendments to the Constitution of the United States.

It denies to the defendant the equal protection of the law, and constitutes a taking of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. *Boyd* v. *United States*, 116 U. S. 617; *Monongahela &c. Co.* v. *United States*, 148 U. S. 325; *Interstate Commerce Com.* v. *Brimson*, 154 U. S. 447, 479; *Hale* v. *Henkel*, 201 U. S. 43; *Logan* v. *Pa. Ry. Co.*, 132 Pa. St. 403;

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Cooley's Const. Lim. 368 *et seq.*; *Lester* v. *People*, 150 Illinois, 408; *Rothwill* v. *Bank*, 20 Hun, 517; *Commonwealth* v. *Lottery Tickets*, 5 Cush. 369; *Sanford* v. *Nichols*, 13 Massachusetts, 286; *Lee* v. *Angas*, L. R. 2 Eq. 39; *Ex parte Brown*, 72 Missouri, 83; *Tharp* v. *Paige*, 66 Arkansas, 229; *State* v. *Slamon*, 73 Vermont, 212; *People* v. *Western Ins. Co.*, 40 Ill. App. 428; *Boyle* v. *Schmidtland*, 146 Pa. St. 255; *Gunn* v. *Railway*, 50 N. E Rep. 132; *Gulf &c. Railway* v. *Ellis*, 165 U. S. 150; *Mo. Pac. Ry.* v. *Mackey*, 127 U. S. 209; *Central &c.* v. *Board of Trade*, 125 Fed. Rep. 468; 3 Wigmore on Evidence, § 2259; *State* v. *Simmons Hardware Co.*, 18 S. W. Rep. (Mo.) 1125; Cooley's Const. Lim. 370; *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591.

When the State goes into the courts for the assertion of its rights it goes upon an equality with other litigants. *State* v. *Morgan*, 52 Arkansas, 150; *Brent* v. *Bank*, 10 Pet. 596; *The Siren*, 7 Wall. 159; *United States* v. *Beebe*, 17 Fed. Rep. 41.

So much of § 9 of the act as purports to authorize the court to strike from the files the pleadings of the defendant upon its failure to comply with the terms of the order entered pursuant to § 8, is unconstitutional and void, and the judgment so rendered constitutes a taking of the property of the defendant without due process of law, and a denial to it of the equal protection of the laws, in violation of the terms of the Fourteenth Amendment to the Constitution of the United States. *McVeigh* v. *United States*, 11 Wall, 259; *Windsor* v. *McVeigh*, 93 U. S. 274; *Hovey* v. *Elliott*, 167 U. S. 444; *Boyd* v. *United States*, 116 U. S. 617; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557; *Holden* v. *Hardy*, 169 U. S. 366; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn. 601; *Adams* v. *Postal Telegraph Co.*, 155 U. S. 689, 698; *Galpin* v. *Page*, 18 Wall. 330; *Lasere* v. *Rochereau*, 17 Wall. 437; *Simon* v. *Croft*, 182 U. S. 427; Cooley's Const. Lim. (6th ed.) 452; *Myers* v. *Shields*, 61 Fed. Rep. 718; *Burton* v. *Platter*, 53 Fed. Rep. 901; *Zeigler* v. *R. R. Co.*, 58 Alabama, 594; *State ex rel.* v. *Billings*, 55 Minnesota, 473; *Foley* v. *Foley*, 52 Pac. Rep. 122; *Younger* v. *Superior Court*, 69 Pac. Rep. 485; *Mc-*

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Clatchey v. *Superior Court*, 51 Pac. Rep. 696; *Greig* v. *Ware*, 55 Pac. Rep. 163; *State* v. *Clancy*, 61 Pac. Rep. 897; *Hebb* v. *County Court*, 37 S. E. Rep. 678; *Underwood* v. *McVeigh*, 23 Grattan (Va.), 409; *Fairfax* v. *Alexander*, 28 Grattan (Va.), 16; *State* v. *City of New Orleans*, 42 La. Ann. 92; *Re the Fred M. Lawrence*, 94 Fed. Rep. 1017; *Altschule* v. *Doyle*, 55 California, 633; *Fayerweather* v. *Richt*, 88 Fed. Rep. 713; *Warner* v. *Godfrey*, 186 U. S. 365; *Baltimore &c. Ry.* v. *Reade*, 62 N. E. Rep. 488; *Chapman* v. *Phœnix Bank*, 85 N. Y. 437; *Grinson* v. *Edwards*, 21 W. Va. 347; *Russell* v. *Grant*, 122 Missouri, 161; *State* v. *Railway Co.*, 45 S. C. 464; *Darr, Administrator*, v. *Rohr*, 82 Virginia, 359; *Schlitz* v. *Roenitz*, 86 Wisconsin, 36; *Carroll &c.* v. *Parks*, 32 Arkansas, 131; *Hickman* v. *Kempner*, 35 Arkansas, 505; *State* v. *Newton*, 33 Arkansas, 276; *Little Rock &c. Ry.* v. *Payne*, 33 Arkansas, 816; *Smith* v. *Leach*, 44 Arkansas, 287; *Clayton* v. *Johnson*, 36 Arkansas, 406.

Mr. Lewis Rhoton and *Mr. James H. Stevenson*, with whom *Mr. F. Guy Fulk*, *Mr. W. F. Kirby*, *Mr. W. L. Terry*, and *Mr. W. M. Lewis* were on the brief, for defendant in error:

The act of 1905 was passed in the exercise of the reserved power of the State to alter, amend or repeal the laws affecting corporations. The appellant by entering the State assented to this reservation, and by remaining in the State after the act took effect assented to be bound by the terms thereof. Constitution of Arkansas, art. 12, § 11; *American Smelting & Refining Co.* v. *Colorado*, 204 U. S. 103; *C., R. I. & P. Ry.* v. *Ludwig*, 156 Fed. Rep. 152.

The right of the State to prescribe conditions upon the right of the defendant and other foreign and domestic corporations to do business in Arkansas, and to lay burdens and duties upon them, flows from the reservation in art. 12, § 6, of its constitution. The only limitation upon this right is contained in the provision that such alteration, amendment or revocation of charters shall be made "in such manner, however, that no injustice shall be done to corporators."

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What would be a just or unjust amendment or alteration of the laws governing corporate privileges, under this constitutional provision, is and must be a question for the state court, and is not a Federal question.

The Supreme Court of Arkansas has held that this act is valid, under the constitution of Arkansas. *Hartford Ins. Co.* v. *State*, 76 Arkansas, 303.

On the hearing of this cause below, the Supreme Court of Arkansas necessarily, in holding that §§ 8 and 9 were valid, held that their enactment was within the constitutional power of amendment reserved to the State. The highest court of a State is the tribunal of last resort upon all questions of the validity of a state statute as measured by the state constitution. *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Mo. Pac. Ry.* v. *Humes*, 115 U. S. 512, 520; *Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 112; *French* v. *Barber Asphalt Co.*, 181 U. S. 324; *Hibben* v. *Smith*, 191 U. S. 310; *Olsen* v. *Smith*, 195 U. S. 332; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 130, 131; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 43; *Hunter* v. *Pittsburgh*, 207 U. S. 67.

Furthermore, the Supreme Court of Arkansas, in the case at bar, has held that these sections are valid, under the constitution of Arkansas—i. e., that they constitute such regulations as fall within the reserved power of the State to alter, amend or repeal the laws governing corporations. Upon this proposition, likewise, the decision of the highest court of the State is conclusive. *Sinking Fund Cases*, 99 U. S. 700; *Miller* v. *State*, 15 Wall. 498; *Holyoke Co.* v. *Lyman*, 15 Wall. 519; *Tomlinson* v. *Jessup*, 15 Wall. 459; *Railway Co.* v. *Maine*, 96 U. S. 510; *Shields* v. *Ohio*, 95 U. S. 324; *Woodson* v. *State*, 69 Arkansas, 521; *Railway* v. *Leep*, 54 Arkansas, 101.

A foreign corporation which comes into a State does so under an implied agreement to all the powers of the State reserved by its constitution. *State* v. *Standard Oil Co. of Indiana*, 91 S. W. Rep. 1062; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Bank of Augusta* v. *Earl*, 13 Pet. 519; *Hooper* v. *California*, 155 U. S. 648.

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The act in question does not punish for acts committed beyond the jurisdiction of the State of Arkansas. The doing of business in Arkansas under given circumstances, and not the formation of the combination, is the gist of the prohibited action. *Hartford Ins. Co.* v. *State*, 76 Arkansas, 303; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226.

Section 8 of the act, referring to the production of witnesses, books, papers and documents to be used as evidence, etc., is not invalid as contended. *Hammond Packing Co.* v. *State*, 81 Arkansas, 540, 541; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Hale* v. *Henkel*, 201 U. S. 43; *State* v. *Standard Oil Co.*, 91 S. W. Rep. 1162; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 133.

Section 9 of the act prescribes a procedure which meets all the requirements of due process of law, and under the facts as shown in the record, plaintiff in error has not been deprived of its property without due process of law. *Holden* v. *Hardy*, 169 U. S. 366; *Brown* v. *New Jersey*, 175 U. S. 178; *Iowa* v. *Iowa Cent. Ry. Co.*, 160 U. S. 389; *L. & N. Ry. Co.* v. *Schmidt*, 177 U. S. 230; *Wilson* v. *North Carolina*, 169 U. S. 586; *Hovey* v. *Elliott*, 167 U. S. 409, distinguished.

The essentials of due process of law as required by the Fourteenth Amendment are notice and opportunity to defend.

A party has no constitutional right to any particular form of procedure or to have applied to a case the rules of procedure which are derived from the common law.

The States, subject only to the qualification that they can not wholly deny a defendant some sort of terms, have the free and uncontrolled right to prescribe new forms of procedure and impose terms and conditions upon parties in their courts.

There is no fixed standard by which the sufficiency of the notice or opportunity to be heard shall be measured; and that the States may constitutionally abolish the ordinary or common law rules governing the hearing of cases and substitute

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other procedures, so long as they give some sort of notice and opportunity to be heard.

Arising out of the distinction between the powers of the States and of the Federal Government, there is a distinction between the due process of law under the Fourteenth and Fifth Amendments, at least to the extent that the States may authorize procedures in their own courts, even unknown to the common law.

The contemporaneous construction of the due process phrase of the Fifth Amendment, placed upon it by the Congress which proposed it, by the passage of the act of 1789, demonstrates that a default judgment may be authorized by statute for refusal to produce evidence, without a denial of due process.

The legislation and decisions of the several States, authorizing such default judgments, demonstrate that the same have never been regarded as denying the due process of law.

MR. JUSTICE WHITE delivered the opinion of the court.

The Hammond Packing Company, an Illinois corporation—hereafter called the Hammond Company—seeks to reverse a judgment for ten thousand dollars as penalties for alleged violations of a state law referred to as the Anti-Trust Act of 1905.

The Hammond Company challenged the authority which the act purported to exert and the forms of procedure which the statute authorized and which were employed to enforce its requirements, because of their alleged repugnancy to the Constitution of the United States, in particulars which were enumerated. The Supreme Court of Arkansas held that the acts which the Hammond Company was charged with having committed were within the prohibitions of the law of 1905, and that the statute was in no respect repugnant to the Constitution of the United States. These conclusions were sustained by considering prior cognate legislation, and a construction given thereto, as well as by an analysis of the act of 1905, elucidated by a prior decision made concerning the same. Before recurring particularly to the procedure and judgment in this case we advert

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to these subjects, as they are essential to a comprehension of the matters here arising for decision.

The constitution of Arkansas of 1874 (§ 11, art. 12) authorized foreign corporations to do business in the State, subject to the same regulations and with the same rights as those enjoyed by domestic corporations. Carrying these provisions into effect, the legislature (Kirby's Digest Laws, Ark., §§ 824 to 827) authorized permits to be issued to foreign corporations, subjecting them to like control and entitling them to the same privileges as domestic corporations on payment of the same fees as were exacted from a domestic corporation and on compliance with other statutory requirements. In § 6, art. 12, of the same constitution there was contained a reservation of the power of the legislature to repeal, alter or amend charters of incorporation, subject, however, to the limitation that thereby "no injustice shall be done to the corporators."

The Hammond Company obtained a permit and engaged in business within the State of Arkansas.

In 1899 what was known as the Rector Act was enacted for the punishment of pools, trusts and conspiracies to control prices, etc. Under this law an action was commenced to recover penalties against the Lancashire Fire Insurance Company, a foreign corporation doing business under a permit. The case was in 1899 decided by the Supreme Court of Arkansas against the State. 66 Arkansas, 466. The court held that "it [the statute] did not intend to prohibit or punish acts done or agreements made in foreign countries by corporations doing business here, when such acts or agreements have reference only to persons or property or prices in such foreign countries."

In January, 1905, the Rector Act was repealed and the statute now in question was enacted. The first section of the new law, which is in the margin,[1] reënacted the first section of the old act, with certain additions, which are in italics. Various sec-

[1] SEC. 1. Any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other association

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tions were added in the new law, of which only §§ 8 and 9 are particularly relevant to this controversy. As we shall hereafter have occasion to specially consider these sections, they are presently put out of view.

The Hartford Fire Insurance Company—a Connecticut corporation—was proceeded against for alleged violations of the act of 1905. The company defended on the ground that it was not a member of or a party to any pool, etc., made in Arkansas, and that it was not a member of any pool, etc., which in any manner affected the premium for insuring property within that State.

In disposing of the case the Supreme Court of Arkansas (76 Arkansas, 303) considered two questions: First, the proper construction of the act; and second, its constitutionality as construed. The first question was thus stated:

"1. Does the act prohibit, under the penalty named therein, a foreign insurance corporation from doing business in Arkan-

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or persons whatsoever, who *are now, or* shall *hereafter* create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding, *whether the same is made in this State or elsewhere,* with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix *either in this State or elsewhere* the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or tornado, or to maintain said price when so regulated or fixed, *or who are now,* or shall *hereafter* enter into, become a member of, or a party to any pool, agreement, contract, combination, association or confederation, *whether made in this State or elsewhere,* to fix or limit *in this State or elsewhere,* the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado or any other kind of policy issued by any corporation, partnership, individual or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalties as provided by this act.

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sas while such corporation is a member of a pool, trust or combination to fix insurance rates anywhere, although such pool, trust or combination is not created or maintained in Arkansas, and does not affect or fix, or attempt to do so, rates of insurance in Arkansas. To state the proposition by illustration: Assume that the appellant is a member of a trust—called a rating bureau—created and maintained in New York city, to fix and maintain insurance rates in New York city and St. Petersburg, but which does not fix or affect rates in Arkansas, is it guilty of a violation of the act if it transacts an insurance business in Arkansas upon complying with all the statutes of the State, except the one at bar?"

In solving this question the court deemed that the correct meaning of the statute was to be ascertained by its text as illustrated by the history of the times indicating the motives which led to the adoption of the act. On this subject it was pointed out that after the decision in the *Lancashire case* public agitation concerning the effect of that decision had arisen and had occasioned an introduction in the legislature at different times of a proposed bill, known as the King bill, intended to counteract the effect of the decision in the *Lancashire case*, but which bill had failed of passage. The court said:

"In 1904 the dominant political party in this State, through its party platform, demanded of the next general assembly the passage of the King bill, and of the purpose of said bill said: 'Whereby all foreign corporations shall be prevented from doing business in this State, if they are members of any trust, pool, combination, or conspiracy against trade, whether such trust, pool, combination, or conspiracy affects or is intended to affect prices or rates in Arkansas or not.' The general assembly elected in 1904, composed almost entirely of members of the political party whose platform is quoted, with remarkable unanimity and rapidity passed the King bill, which had been rejected by the two preceding general assemblies, and in less than a fortnight of its organization it was approved, and it is the statute now at bar."

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It was decided (Wood and Battle, JJ., dissenting) "that the general assembly intended by this act to subject to the penalty of it any foreign corporation doing business in this State while a member of a trust formed to fix prices anywhere."

The act as thus interpreted was sustained upon the theory that "the State has dictated these terms upon which foreign insurance companies can do business in this State," and the State "possesses the right to declare that foreign insurance corporations cannot do business in this State while belonging to a pool, trust, combination, conspiracy, or confederation to fix or affect insurance rates anywhere."

Shortly after the decision in the *Hartford case* this action was commenced by the State against the Hammond Company for a forfeiture of its permit to do business in Arkansas and for money penalties. As finally amended the complaint consisted of four paragraphs or counts. As, however, during the progress of the cause counsel stipulated that if any relief was awarded against the Hammond Company it should be confined to the matters charged in the first paragraph of the complaint and be limited to a money recovery not exceeding ten thousand dollars, and effect was given to the stipulation in the final action of the court, we put all but the first paragraph out of view.

In the first paragraph the existence of the Hammond Company and its carrying on the business of dealing in live stock and the products thereof in Arkansas at a date named was averred. It was then charged that on the date mentioned, and other stated days, the company, in violation of the act of 1905, was a member or party to a pool or trust, agreement, combination or understanding with corporations and persons, named and unnamed, who were engaged in the same line of business to regulate the prices of slaughtered live stock and to maintain such prices as so regulated and fixed. The paragraph concluded with the prayer for "judgment that the right and privilege of said defendant to do business in this State be declared forfeited, and that plaintiff have and recover of said defendant the sum of thirty thousand dollars, and all her costs in this suit

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expended, together with all the expenses of the attorney general in prosecuting same, as provided in said act, and for all other and proper relief."

On the ground that the complaint was so vague that it was impossible to answer the same, the Hammond Company moved that the State be directed to make the complaint more specific, so as to show when the alleged pool or trust was created, in what respect it constituted a violation of the statute, and where, in the vast area in which it was alleged the business of the company was carried on, the asserted unlawful agreement was to operate. The motion was denied.

The complaint was demurred to on the ground that it did not allege the formation of any pool or trust in Arkansas or that it was to affect prices within that State, and therefore if the facts charged were within the prohibition of the statute the act was wanting in due process of law and was repugnant to the Fourteenth Amendment, because it was an attempt by the State to exercise authority beyond its jurisdiction. On the overruling of the demurrer the first paragraph was answered by a general and specific denial of each and every allegation thereof. Moreover, it was specially asserted that the permit was a contract on the faith of which large sums of money had been expended in purchasing property and in making permanent improvements thereon within the State which would be destroyed by a revocation of the permit, and that the business of the company was largely interstate commerce. Various defenses under the Constitution of the United States were specifically advanced, as follows: First, that to revoke the permit for the causes alleged would impair the obligations of the contract which had resulted from the issue of the permit; and, second, that to grant the relief prayed would violate the equal protection, due process, *ex post facto* and interstate commerce clauses of the Constitution of the United States.

A request of the Hammond Company that all depositions to be taken outside of the jurisdiction of the court be upon written interrogatories was denied.

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The Attorney General, availing himself of § 8 of the act, which is in the margin,[1] moved for the appointment of a commis-

[1] SEC. 8. Whenever any proceeding shall be commenced in any court of competent jurisdiction in this State by the attorney general or prosecuting attorney against any corporation or corporations, individual or individuals, or association of individuals, or joint stock association or copartnership under the law against the formation and maintenance of pools, trusts of any kind, monopolies or confederations, combinations or organizations in restraint of trade, to dissolve the same or to restrain their formation or maintenance in this State, or to recover the penalties in this act provided, then and in such case, if the attorney general or prosecuting attorney desires to take the testimony of any officer, director, agent, or employé of any corporation, or joint stock association proceeded against, or in case of a copartnership, any of the members of said partnership, or any employé thereof, in any court in which said action may be pending; and the individual or individuals whose testimony is desired are without the jurisdiction of this State, or reside without the State of Arkansas, then in such case, the attorney general or prosecuting attorney may file in said court in term time, or with the judge thereof in vacation, a statement, in writing, setting forth the name or names of the persons or individuals whose testimony he desires to take, and the time when and the place where he desires said persons to appear; and thereupon the court or judge thereof shall make an order for the taking of said testimony of such person or persons and for the production of any books, papers and documents in his possession or under his control relating to the merits of any suit, or to any evidence therein, shall appoint a commission for that purpose, who shall be an officer authorized by law to take depositions in this State, and said commission shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said cause, or agent, or officer, or other employé, that the testimony of the person named in the application of the attorney general or the prosecuting attorney is desired, and requesting said attorney or attorneys of record, or said officer, agent or employé to whom said notice is delivered, and upon whom the same is served, to have said officer, agent, employé, representative of said copartnership, or agent thereof, whose evidence it is desired to take, together with such books, papers and documents, at the place named in the application of the attorney general, or the prosecuting attorney, and at the time fixed in said application, then and there to testify: *Provided, however*, That such application shall always allow in fixing said time the same number of days' travel to reach the designated place in Ar-

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sioner to take testimony in the city of Chicago and for the production and examination before him of books and papers. The motion stated, first, that sixteen named persons resided in or near Chicago, and were either officers, agents, directors or employés of the Hammond Company; that it was the desire of the State to take their testimony on a day named, that all of said witnesses were hostile and would not make fair answers to written interrogatories, that the facts as to the business methods of the corporation "relevant to the issue in this case and within the knowledge of the said persons aforementioned are such that your relator can have no accurate knowledge of same until opportunity is given him to interrogate the aforesaid persons, who have peculiar and sole knowledge thereof; and that it is impossible for your relator to so frame written interrogatories to said persons as to elicit the facts within their knowledge relevant to the issues in this case." As to the production of books and papers, it was stated that "said persons have in their possession and under their control, and at the Chicago office of the defendant company, numerous books, papers and documents bearing upon the issues in this cause and relevant to the claim of the plaintiff herein; that the precise description and nature of these is peculiarly within the knowledge of the aforesaid persons; and that it is impossible for your relator to so frame written interrogatories and demands as to require the production of such books, papers and documents as aforesaid as are relevant to the issues in this cause." In response to this motion the Hammond Company asked that the State be required to "set out specifically what she expects to prove by each witness she desires produced, and also to set out specifically a particular

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kansas that would now be allowed by law in case of taking depositions: *Provided, also,* In addition to the above-named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer or employé on whom notice is served to notify the person or persons whose testimony is to be taken. Service of said notice as returned in writing may be made by any one authorized by law to serve a subpœna.

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description of any books she desires produced by any of said witnesses, together with the name of the witness who is to produce them, and that she be required to specifically state wherein any of said books so named are material to the issues in the case." The Attorney General thereupon filed an affidavit, reciting that he was "at this time unable to designate and particularly point out the books, papers and documents which will be required in evidence on the execution of the commission . . . that the contents and particular description of said books, papers and documents are matters peculiarly within the knowledge of the defendant, and the witnesses whose examination is prayed at said time and place, and that it is impossible and impracticable for me at this time to designate particularly the matters as to which each witness whose testimony is sought to be taken . . . can testify, or to frame interrogatories to such witnesses or state at this time the substance of his evidence, for the reason that the matters as to which it is sought to examine said witnesses are matters touching the conduct and business of the defendant company and as to which the defendant and said witnesses have peculiar and sole knowledge." The motion to make the request more specific was overruled and an order was entered authorizing the designated commissioner to take the testimony of the witnesses named and to have produced before him by the Hammond Company "any books, papers and documents in the possession or under the control of either of said persons relating to the merits of said cause or to any defense therein," accompanied with the proviso "that at such examination the witnesses and books aforesaid shall not be required to be produced at any one time in such numbers as to interfere with the operation of the defendant's business." The order contained specific directions commanding the Hammond Company, through its officers or agents or attorney, to have the witnesses named present for examination and to produce the books referred to in the order. To the entry of this order exception was duly reserved.

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The commissioner notified the Hammond Company to produce the witnesses named and the books and papers referred to at his office in Chicago on a designated day. The Hammond Company, through its attorneys, declined to comply and stated, in writing, that it could not concede the power of the court to make the order which it had made, and that "on the contrary it was of the opinion that the request calls upon it [the Hammond Company] to surrender rights in which it is protected by the Constitution of the United States and of the State of Arkansas that are too valuable to be surrendered."

Return, stating the refusal to produce, having been made to the court, the Attorney General, under § 9 of the act of 1905, which is in the margin,[1] moved to strike out all "answers, de-

[1] SEC. 9. Whenever the persons mentioned in the preceding sections shall be notified, as above provided, to request any officer, agent, director or employé to attend before any court, or before any person authorized to take the testimony in said proceedings, and the person or persons whose testimony is requested, as above provided, shall fail to appear and testify and produce any books, papers and documents, they may be ordered to produce by the court, or the other officer authorized to take such evidence, then it will be the duty of the court, upon motion of the attorney general or prosecuting attorney, to strike out the answer, motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding by the said corporation, joint stock association or copartnership, whose officer, agent, director or employé has neglected or failed to attend and testify and produce all books, papers and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony, and said court shall proceed to render judgment by default against said corporation, joint stock association or copartnership. *And it is further provided*, That in case any officer, agent, employé, director or representative of any corporation, joint stock association or copartnership in such proceeding, as hereinbefore mentioned, who shall reside or be found within this State, shall be subpœnaed to appear and testify or to produce books, papers and documents, and shall fail, neglect or refuse to do so, then the answer, motion, demurrer or other pleading then and thereafter filed by said corporation, joint stock association or copartnership in any such proceeding, shall, on motion of the attorney general or prosecuting attorney, be stricken out and judgment in said cause rendered against said corporation, joint stock association or copartnership.

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murrers, motions, replies or other pleadings filed by the defendant in this cause and render in favor of the State of Arkansas a default judgment in this case for ten thousand dollars, as penalties for the violations of the act of the general assembly of the State of Arkansas, approved January 23, 1905, on the days and dates set forth in the complaint herein, and for all costs in this cause incurred." The Hammond Company, in response to the motion, set up the defense that to deny it the right to defend would be a condemnation without a hearing and a consequent denial of due process of law in conflict with the Fourteenth Amendment. The motion of the Attorney General was granted, and a judgment for penalties amounting to ten thousand dollars was, as before stated, entered, which on appeal was affirmed by the Supreme Court. 81 Arkansas, 519.

On the general question of the meaning of the act of 1905 the court adhered to the interpretation given the act in *Hartford Insurance Co.* v. *State, supra,* and also to the ruling in that case made concerning its validity, both as regards the constitution of the State and that of the United States. After holding that the proceeding was not criminal but was "purely a statutory action to recover the penalties of the statute for doing business in the State contrary to its terms," the court came to consider the objections urged to the validity of §§ 8 and 9. Passing on the contention that the order made under § 8 for the production of books, papers and witnesses was so unlimited as to be repugnant to the state and Federal constitutions, the subject was considered from a twofold aspect; first, the order for the production of the books and papers; and, second, that for the production of witnesses. As to the first, while conceding for the sake of argument that it might be that an order on a corporation, whether domestic or foreign, for the production of books and papers could be framed in so unlimited a manner as to amount to a violation of a provision against unreasonable searches and seizures found in the state constitution, it was held that that question was irrelevant and not necessary to be

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decided. This conclusion was reached because it was declared that, as the order called also for the production of witnesses, if there was a failure to comply with that portion of the order the judgment below was properly rendered. Considering the validity of the order for the production of the witnesses and the contention that it was so arbitrary and unreasonable as to amount to a denial of due process of law, because it called upon the corporation to produce a number of witnesses, simply upon the averment that they had some contract or fiduciary relation with the company, without at all considering its power to produce them or affording to the corporation any compulsory process for requiring the witnesses to attend if they were unwilling to do so, the court, speaking of the statute, said:

"If these provisions mean that the corporation must be a policeman, and bring into court on demand its president, bookkeeper or doorkeeper *vi et armis*, certainly it would be an unreasonable imposition. An analysis of the provisions, however, will not justify such construction. These sections evidently mean this and nothing more: that the corporation shall on demand request any given officer, agent or employé to be present at the time named for examination as a witness (and in case of production of books and papers that the given officer or agent produce the given papers), and on a failure to comply with these requirements that it be defaulted. Of course this necessarily contemplates an honest effort to produce the testimony called for. When that is made, then the statute is complied with; when it is not, as in this case, where the defendant corporation refused to obey any part of the order, then the statute is not complied with, and that brings up the gravest question of the case."

In holding that the provisions of § 9, authorizing the striking out of the pleadings of the defendant and rendering judgment against him, as by default, were valid, the court held that the conferring of such a power by the statute, and its exercise as manifested in the case before it, was not repugnant to either

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the constitution of the State or that of the United States. In reaching this conclusion the court, in substance, held that the ruling of this court in *Hovey* v. *Elliott*, 167 U. S. 416, must be limited to a case where a court, in virtue alone of its asserted inherent power to punish for contempt, strikes an answer from the files and renders judgment as by default, and therefore did not embrace a case where such authority was exercised by a court in consequence of an express delegation by law of the power so to do. This limitation on the ruling in *Hovey* v. *Elliott* was deemed to be justified by a reference to and an analysis of the statutory law of the United States, which the court deemed conferred such power upon the courts of the United States, as well as many state statutes, including those of Arkansas and various state decisions, all of which it was deemed established the existence of the legislative power to authorize a court to punish a defendant by striking his answer from the files, and, over his objection, rendering a judgment against him.

Condensing, though not changing, the substance of the assignments of error, in the light flowing from the review which we have made, we come to dispose of such assignments, not, however, following the precise order in which they are stated in the brief of counsel.

1*st*. *Section* 1 *of the law of* 1905 *legislates concerning acts done beyond the limits of the State, and therefore takes property without due process of law, and deprives of the equal protection of the laws, contrary to the Fourteenth Amendment.*

But the premise upon which the proposition is based is imaginary, since it assumes that the statute does that which it has been conclusively determined by the court below it does not do. The interpretation which the court below gave to the statute was that it did not purport to forbid or affix penalties to acts done beyond the State, but that it simply forbade a corporation from continuing to do business within the State after it had done, either within or outside of the State, the enumerated acts. If the premise of the asserted proposition

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be that even although the statute addressed itself exclusively to the doing of business within the State under the circumstances stated, it nevertheless exerted an extraterritorial power, because it restrained the continuance of the business within the State by a corporation which had done the designated acts outside of the State, we think the proposition without merit. As the State possessed the plenary power to exclude a foreign corporation from doing business within its borders, it follows that if the State exerted such unquestioned power from a consideration of acts done in another jurisdiction, the motive for the exertion of the lawful power did not operate to destroy the right to call the power into play. This being true, it follows that, as the power of the State to prevent a foreign corporation from continuing to do business is but the correlative of its authority to prevent such corporation from coming into the State, unless by the act of admission some contract right in favor of the corporation arose, which we shall hereafter consider, it follows that the prohibition against continuing to do business in the State because of acts done beyond the State was none the less a valid exertion of power as to a subject within the jurisdiction of the State.

In both the refusal to permit the coming into the State and the exclusion therefrom of a corporation previously admitted under the circumstances stated, while it may be said that the acts done out of the State and their anticipated reflex result may have been the originating cause for the exertion of the lawful authority to refuse permission to come into the State, or to revoke such permission previously given, that fact is immaterial in a judicial inquiry as to the right either to refuse to give or to revoke a permit to do business within the State, since the power, and not the motive, is the test to be resorted to for the purpose of determining the constitutionality of the legislative action.

Although it be conceded that the provisions of the statute cannot consistently with constitutional limitations be applied to individuals, such concession would not cause the act to amount to a denial of the equal protection of the laws. The

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difference between the extent of the power which the State may exert over the doing of business within the State by an individual and that which it can exercise as to corporations furnishes a distinction authorizing a classification between the two. It is apparent that the court below, both in the *Hartford case* and in this, by a construction which is here binding, treated the statute, in so far as its prohibitions were addressed to individuals, as separable from its requirements as to corporations, and, therefore, even though there was a want of constitutional power to include individuals within the prohibitions of the act, that fact does not affect the validity of the law as to corporations.

2d. *The act as construed by the court below is repugnant to* § 10 *of Art. I of the Constitution of the United States, since the necessary effect of that construction is to impair the obligation of the contract which was created in virtue of the constitution and laws of Arkansas by the permit which was issued.*

By the constitution and laws of the State of Arkansas it is said foreign corporations, when lawfully admitted to do business in the State, were entitled to rights equal to those enjoyed by domestic corporations. Possessing this right of equality, it is argued that a permit to do business could not be revoked for causes not made applicable to domestic corporations without impairing the obligations of the contract which arose from the permit. *American Smelting Company* v. *Colorado,* 204 U. S. 103. With this proposition in hand—which is not denied by the State—the argument insists that as the statute does not forbid a domestic corporation from continuing to do business under a charter granted by the State, because it has done the acts specified in the statute, therefore a discrimination results in favor of domestic corporations. But, again, the contention rests upon an erroneous assumption as to the operation of the statute. We say this because on the face of the statute its prohibitions are made applicable to domestic and foreign corporations. The insistence that the result of the decision in this case, as well as of that made in the *Hartford case,* is to give the stat-

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ute a controlling construction, operating to exempt domestic corporations from its provisions, is unfounded. True, that both in the *Hartford case*, as in this, the court below, in testing the question of power considered solely the scope of the legislative authority over foreign corporations. But in so doing the court simply confined itself to the question before it, as in both cases the defendants were foreign corporations doing business under permit. Nothing in the general reasoning advanced by the court as to the power of the State over foreign corporations begets the thought that it was intended to decide that the express words of the statute concerning domestic corporations were meaningless or beyond the authority of the State to enact. While it is true that the reference made in the opinion in the *Hartford case* to the platform of the dominant political party which it was assumed shed light upon the true meaning of the act indicates that the impelling motive in adopting the act of 1905 was to reach foreign corporations, this does not justify the inference that the act was not intended to govern domestic corporations doing like acts, but, on the contrary, tends to establish the existence in the legislative mind of the purpose not to discriminate in favor of domestic corporations, since the latter were expressly embraced in the statute.

The contention that to apply the law to domestic corporations would as to such corporations cause it to be repugnant to the contract clause of the Constitution, is without merit. The chartered right to do a particular business did not operate to deprive the State of its lawful police authority, and therefore the franchise to do the business was inherently qualified by the duty to execute the charter powers conformably to such reasonable police regulations as might thereafter be adopted in the interest of the public welfare. Besides, it is not disputed that the State under its constitution had a reserve power to repeal, alter and amend charters by it granted, and therefore, even if the impossible assumption was indulged that the grant of the power to do business implied in the absence of such reservation the right to carry on the business in violation of a lawfully

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regulating statute, the existence of the reserve power leaves no semblance of ground for the proposition. The claim of an irrepealable contract cannot be predicated upon a contract which is repealable. *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636, 644. And no support for the contrary view arises, because the constitution of Arkansas exacted that the authority to repeal, alter and amend should be exercised "in such manner, however, that no injustice be done to the corporators." The determination whether the power to repeal, alter or amend was exerted in such a manner as to be unjust to incorporators was within the province of the state court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract clause, to deprive of some other and fundamental right which was within the protection of the Constitution of the United States.

3*d*. *The action of the trial court in making the order to produce, and on failure to comply therewith, striking the pleadings of the Hammond Company from the files and rendering a judgment as by default, was void, because repugnant to the equal protection and due process clauses of the Fourteenth Amendment.*

As the conduct of the trial court on the subjects with which this proposition is concerned conformed to the authority conferred by §§ 8 and 9 of the statute, it follows that the proposition is that those sections are repugnant to the Fourteenth Amendment. The grounds which are made the basis of this proposition are numerous and are stated in various forms not separated one from the other. We shall disentangle them and treat them separately, and thus consider and dispose of them all.

It is said, conceding that the power which § 8 confers could be exerted under just limitations, yet the order made, which was authorized by the statute, was so unlimited, so arbitrary and unjust as to cause it to be wanting in due process. This rests upon the assumption that the order to produce the books and papers of the company and the witnesses, was imperative, and did not consider the ability of the company to comply, furnished no compulsory process to compel obedience in case a

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named witness refused to appear at the request of the company, and therefore left the company helpless and subject to pains and penalties for a failure to do that which it may not have been in its power to do. But again the proposition rests upon the assumption that the statute and the order which conformed to it did that which the court below decided it did not do. Conceding, for the sake of the argument, that the broad provisions of § 8 and the general language of the order to produce, might on their face be amenable to the criticism which the proposition involves, the statement we have previously made demonstrates that the court below, by a construction which is binding here, expressly decided that neither the statute nor the order were subject to the interpretation which the argument attributes to them. Indeed, the court impliedly conceded that if the statute and the order meant that which the argument contends they did mean, both the statute and the order would have been void. But in intimating to that effect it was expressly held that all the statute required was a *bona fide* effort to comply with an order made pursuant to its provisions, and therefore any reasonable showing of an inability to comply would have satisfied the requirements both of the statute and the order. As the Hammond Company absolutely declined to obey the order and stood upon what it deemed to be its lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the statute, it is not within our province to afford relief because of an error of judgment in this respect. That is to say, we may not hold that the statute and order were arbitrary and unjust in the particulars asserted when it is conclusively determined that they do not have that effect.

It is insisted that the order to produce was so general and indefinite as to amount to an unreasonable search and seizure, and consequently was wanting in due process of law. But conceding, for the sake of argument only and not so deciding that the due process clause of the Fourteenth Amendment embraces in its generic terms a prohibition against unreasonable searches

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and seizures, a question hitherto reserved, under circumstances analogous to those here present, in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, we think the ruling made in that case establishes the unsoundness of the contention. We say this because it was in that case determined in view of the visitorial powers of a State over corporations doing business within its borders and the right of the State to know whether the business of a corporation was being carried on in a lawful manner, that it was competent for the State to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the State had been complied with. And of course such power embraces the authority to require the giving of testimony by the officers, agents and other employés of the corporation for like and analogous purposes. It is true that the books and papers to which the order made in the cited case related were those of a foreign corporation doing business in Vermont, and which had been kept in the State, but had been taken therefrom. But we see no reason to hold that this case is not controlled by the principle applied in the *Consolidated Rendering Co. case*, because the books of the Hammond Company, which were called for, may not have been at any time kept within the State of Arkansas.

Nor do we think there is merit in the contention that the order to produce was wanting in due process because it was made in a pending suit and sought to elicit proof not only as to the liability of the company, but also the proof in the possession of the company relevant to its defense to the claim which the State asserted. As these subjects were within the scope of the visitorial power of the State and concerning which it had the right to be fully informed, the mere incident or purpose for which the lawful power was exerted affords no ground to deny its existence. In *Consolidated Rendering Company* v. *Vermont*, the books and papers were required for an investigation before a grand jury concerning supposed misconduct of the corporation. The power to compel the production to ascertain whether wrong had been done, in the nature of things, as the greater in-

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cludes the less, is decisive as to the right to exact the production for the purpose of proof in a pending cause. See *Hale* v. *Henkel*, 201 U. S. 43. If, as was in that case decided, the power of visitation could be exercised, even although it might lead to the production of incriminating evidence merely because the order to produce in this case called for evidence in the possession of the corporation relevant to its defense did not affect the validity of the order.

The contention that because § 8 applies only to books and papers outside of the State, therefore it denies the equal protection of the laws is not open, since it has been conclusively settled that, without denying the equal protection of the laws, relations may be based upon the fact that persons or property dealt with are not within the territorial jurisdiction of the regulating authority. *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84. Even if, as contended, the remedy given by the act for the production of books and papers and the examination of witnesses is confined to corporations and joint stock associations, and does not extend to individuals, that fact also furnishes no ground for the proposition that a denial of the equal protection of the laws thereby resulted. The wider scope of the power which the State possesses over corporations and joint stock associations in and of itself affords a ground for the classification adopted.

Lastly, with much earnestness and elaboration, it is urged that the action of the court, authorized by § 9, in striking the answer from the files and rendering a judgment as by default, is conclusively demonstrated to have been a denial of due process of law by the ruling in *Hovey* v. *Elliott*, 167 U. S. 409, and the previous cases in this court which were there cited and applied. The ruling in *Hovey* v. *Elliott* was that to punish for contempt by striking an answer from the files and condemning, as by default, was a denial of due process of law, and therefore repugnant to the Fourteenth Amendment. There the power to strike out and punish was exerted, by the court, in virtue of what it assumed to be its inherent authority, and the occasion

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which caused the exercise of the assumed authority was the refusal of the defendant to comply with an order to pay into the registry of the court a sum of money which, it was held, had been illegally withdrawn, and the right to which was at issue in the suit. Merely because the power to strike out an answer and enter a default, which was exerted by the court below in this case, was authorized by the ninth section of the statute furnishes no ground for taking this case out of the ruling in *Hovey* v. *Elliott*, if otherwise controlling. The fundamental guarantee of due process is absolute and not merely relative. The inherent want of power in a court to do what was done in *Hovey* v. *Elliott* was in that case deduced from no especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the Government without transgressing the constitutional safeguard as to due process, at all times dominant and controlling where the Constitution is applicable. Indeed in *Hovey* v. *Elliott* the impotency of the legislative department to endow the judicial with the capacity to disregard the Constitution was emphasized. But while this is true the question yet remains, Is the doctrine of *Hovey* v. *Elliott* here applicable? To determine this question we must take into view the authority below, exerted not from a merely formal point of view, but in its most fundamental aspect. That is to say, we must trace the power to its true source, and if from doing so it results that the authority exerted flows from a reservoir of unquestioned power it must follow that the action below was not unlawful, albeit in some narrower aspect that action might be considered as unlawful. The essential basis for the exercise of power and not a mere incidental result arising from its exertion is the criterion by which its validity is to be measured. *Hovey* v. *Elliott* involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the un-

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doubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in *Hovey* v. *Elliott*, and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception therefore the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law.

As pointed out by the court below, the law of the United States as well as the laws of many of the States, afford examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for. Rev. Stat. U. S. § 724, which was drawn from § 15 of the judiciary act of 1789, after conferring upon courts of law of the United States the authority to require parties to produce books and writings in their possession or under their control which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceed-

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ings in chancery, expressly empowers such courts, if a plaintiff fails to comply with the order to render a judgment of non-suit, and if a defendant fails to comply "the court may, on motion, give judgment against him by default." From the time of this enactment, practically coeval with the Constitution, although controversies have arisen as to its interpretation, no contention, so far as we can discover, has ever been raised questioning the power given to render a judgment by default under the circumstances provided for in the statute. Its validity was taken for granted by the court, speaking through Mr. Chief Justice Taney, in *Thompson* v. *Selden*, 20 How. 194, and this was also assumed by the court, speaking through Mr. Justice Bradley, in *Boyd* v. *United States*, 116 U. S. 616, where the effect of the constitutional guarantees embodied in the Fourth and Fifth Amendments were elaborately and lucidly expounded. It is unnecessary to cite the many cases in the lower Federal courts which manifest the same result, as they will be found collected in Gould & Tucker's Notes on the Revised Statutes, under § 724, and in the notes to the same section, contained in volume 3, Federal Statutes Annotated.

And, beyond peradventure, the general course of legislation and judicial decision in the several States indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations prescribed by the legislative authority, and for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed. While it may be true that in some of the state statutes passed on the subject, and in decisions applying them, some confusion may appear to exist, resulting from confounding the extent of the authority to punish as for a contempt and the right to engender a presumption relative to proof arising from a failure to give or produce evidence, it is accurate to say that when viewed comprehensively the statutes and decisions in effect recognize the difference between the two, and

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therefore may be substantially considered as but an exertion by the States of a like power to that which was conferred upon the courts of the United States by the original judiciary act and by Revised Statutes, § 724.

Without referring in detail to the various statutes, which will be found collected as of the year 1896, in vol. 6, Ency. Law and Practice, note 3, pp. 812 *et seq.*, we content ourselves with saying that the laws of Indiana, Iowa, Mississippi, Massachusetts, Missouri, New Hampshire, Texas and Washington aptly portray the subject. As illustrative, we refer specially to the statute of Missouri, which directs that when a party refuses to produce evidence or fails to attend to testify on a proper order, besides being punished as for a contempt, the court may strike out the answer filed on behalf of the defendant, etc. This distinction is also marked in the Indiana and Washington statutes. Although the statute of Mississippi, which authorizes, in the event of a failure to obey a proper order as to the production of evidence, the striking of an answer from the files and the entry of judgment by default does not in terms refer the authority thus given to the legislative power to engender a presumption, the true source of the power was clearly pointed out in the concurring opinion of Whitfield, J. (now Chief Justice of the Supreme Court of Mississippi), in *Illinois Central R. Co.* v. *Sanford*, 75 Mississippi, 862, and the distinction was made manifest between the power to create a presumption of fact and the want of authority as a mere punishment for contempt to deny a hearing, as ruled in *Hovey* v. *Elliott*. And the difference between the two is also elucidated in the opinion of the Supreme Court of the State of Washington in *Lawson* v. *Black Diamond Mining Co.*, 44 Washington, 26, which interpreted and enforced a statute of the State of Washington embraced in § 6013 and immediately antecedent sections of Ballinger's Annotated Code and Statutes.

As the power to strike an answer out and enter a default, conferred by § 9 of the act of 1905, which is before us, is clearly referable to the undoubted right of the lawmaking authority

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to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation. In so deciding our conclusion is of course based upon the legality and sufficiency of the order to produce made under § 8 of the act, and as our decision on that subject rests upon the extent of the visitorial power which the State had the right to exercise over a corporation subject to its control, our ruling as to the legality of the call under § 8 is confined to the case before us.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE PECKHAM dissent.

THE FOLMINA.[1]

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 84. Argued January 21, 22, 1909.—Decided February 23, 1909.

When goods which were received in good order on board a vessel under a bill of lading agreeing to deliver them, at termination of the voyage, in like good order and condition are damaged on the voyage, the burden is on the carrier to show that the damage was occasioned by a peril for which he was not responsible. *Clark* v. *Barnwell*, 12 How. 272.

Merely proving that damage to cargo was by sea water does not establish that such damage was caused by peril of the sea within the exception of the bill of lading; in such a case conjecture cannot take the place of proof. *The G. R. Booth*, 171 U. S. 450.

Where a certified question does not propound a distinct issue of law,

[1] Docket title, No. 84, Jahn v. Steamship Folmina, Van Eyken, Claimant.

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but in effect calls for a decision of the whole case, this court need not, and in this case does not, answer it. *Chicago, B. & Q. R. R.* v. *Williams*, 205 U. S. 444.

The question "whether damage to the cargo of an apparently seaworthy ship, through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of an exception in a bill of lading exempting the carrier from the act of God . . . loss or damage from . . . explosion, heat or fire on board . . . risk of craft or hulk or transshipment, and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature and kind" answered in the negative.

The question "whether the ship is relieved from liability in consequence of said exception," not presenting a distinct issue of law, not answered.

THE facts are stated in the opinion.

Mr. Frederick M. Brown for Jahn *et al.*:

The questions submitted to this court for answer in this cause are favorably controlled by *The G. R. Booth*, 171 U. S. 450. The only differences between the facts in that case and the facts in the instant case are differences which make the owner of cargo on the Folmina more clearly entitled to redress than the owners of the cargo of the Booth. In the *Booth case* the carrier fully explained the entrance of the sea water; in the present case the carrier either cannot or will not explain how the sea water entered. In the *Booth case* the Circuit Court of Appeals certified as a fact that the steamer was actually seaworthy; in the present case it merely certified that there was an appearance of seaworthiness and that competent surveyors could not discover any defect. In the *Booth case* the facts certified by the Circuit Court of Appeals excluded the hypothesis of negligence on the part of the carrier or his crew; in the present case the Circuit Court of Appeals has only certified that the record contains no evidence showing negligence or fault on the part of the Folmina's crew.

No other point of difference between the two cases has been discovered.

It is just as certain in the case of the Folmina as in the case

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of the Booth that there must have been an efficient agency or cause, permitting the sea water to enter. So long as that efficient cause remains undisclosed, the courts cannot know whether the damage comes within the scope of the sea peril exception or not. As it is the obligation of the carrier, upon fundamental principles, to bring the case within some contractual exception or statutory exemption from liability in order to exonerate himself, it follows that the Folmina must be liable, and the questions certified must be answered in the negative. See also *The Thrunscoe* (1897), Prob. 301.

Carriers should not escape liability for cargo damage without establishing clearly and satisfactorily the cause of damage and their right to exoneration. See *The Mohler*, 21 Wall. 230, 233; *Propeller Niagara* v. *Cordes*, 21 How. 7, 25; *The Caledonia*, 157 U. S. 124, 144; *Forward* v. *Pittard* (1785), 1 Durnford & East, 27; *The Edwin I. Morrison*, 153 U. S. 214; *The Mascot*, 48 Fed. Rep. 119; *S. C.*, 51 Fed. Rep. 605.

Once the carrier is able to show with the requisite degree of clearness that the damage is of an excepted character, the prevailing rule is that he need go no further to establish affirmatively that he was free from negligence in the premises; the shipper in this event having the burden of proving negligence. *Clark* v. *Barnwell*, 12 How. 272.

Nevertheless, there is a very respectable body of authority to the effect that even in this case it is contrary to public policy to impose upon the cargo owner a burden of proof which he is, from his inherent position, so ill adapted to bear. *Pittsburg &c. R. Co.* v. *Racer*, 5 Ind. App. 209; *Tardos* v. *Toulon*, 14 La. Ann. 429; *J. Russell Mfg. Co.* v. *New Haven Steamboat Co.*, 50 N. Y. 121; *Mitchell* v. *Carolina Cent. R. Co.*, 124 N. C. 236; *Pennsylvania R. Co.* v. *Miller*, 87 Pa. St. 395; *Johnstone* v. *Richmond &c. R. Co.*, 39 S. C. 55; *Alabama Gt. Southern R. Co.* v. *Little*, 71 Alabama, 611; *Central &c. Co.* v. *Hasselkus*, 91 Georgia, 382; *Adams Express Co.* v. *Stettaners*, 61 Illinois, 184; *Louisville &c. R. Co.* v. *Thompson*, 13 Ky. L. Rep. 973; *Mahon* v. *Steamer Olive Branch*, 18 La. Ann. 107; *Hinton* v. *Eastern R.*

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Co., 72 Minnesota, 337; *Southern Express Co.* v. *Seide*, 67 Mississippi, 609; *Crow* v. *Chicago &c. R. Co.*, 57 Mo. App. 135; *Union Express Co.* v. *Graham*, 26 Ohio St. 595; *Turney* v. *Wilson*, 7 Yerg. (Tenn.) 339; *Brown* v. *Adams Express Co.*, 15 W. Va. 812; *Kirst* v. *Milwaukee &c. R. Co.*, 46 Wisconsin, 489; *Texas &c. R. Co.* v. *Richmond*, 94 Texas, 571.

Unexplained sea water damage to cargo is not of itself a sea peril, however seaworthy the vessel may appear. *The Reeside*, 2 Sumner, 567; *S. C.*, Fed. Cas. No. 11,657; *The Warren Adams*, 74 Fed. Rep. 413, 415; *Ins. Co.* v. *Easton & M. Transp. Co.*, 97 Fed. Rep. 653; *The Henry B. Hyde*, 90 Fed. Rep. 114, 116; *The Lennox*, 90 Fed. Rep. 308, 309; *The Patria*, 132 Fed. Rep. 971, 972; *The Svend*, 1 Fed. Rep. 54; *Bearse* v. *Ropes*, 1 Sprague, 331; *S. C.*, Fed. Cas. No. 1192; *The Zone*, 2 Sprague, 19; *S. C.*, Fed. Cas. No. 18,220; *The Queen*, 78 Fed. Rep. 155, 165, 168; affirmed 94 Fed. Rep. 180, 196; *The Centennial*, 7 Fed. Rep. 601; *The Lydian Monarch*, 23 Fed. Rep. 298; *The Compta*, 4 Sawyer, 375. To the same effect: *The Sloga*, 10 Ben. 315; *S. C.*, Fed. Cas. 12,955; *The Phœnicia*, 90 Fed. Rep. 116, 119; *S. C.*, 99 Fed. Rep. 1005; *Ins. Co.* v. *Easton & M. Transp. Co.*, 97 Fed. Rep. 653; *The Presque Isle*, 140 Fed. Rep. 202, 205.

The only inference properly drawn from the facts certified is that sea water entered the Folmina, not owing to any sea peril, but owing to the steamer's latent unseaworthiness or owing to some undiscovered internal mishap similar to that which occurred in the *Booth case* owing to some other cause for which the steamer is liable.

The carrier having the burden of explanation, the legal inference from failure to explain is that sea water found entrance to the hold of the Folmina owing to some cause for which the carrier is legally liable. *Nelson* v. *Woodruff*, 1 Black, 156, 160; *The Warren Adams*, 74 Fed. Rep. 413, 414.

Mr. J. Parker Kirlin, with whom *Mr. John M. Woolsey* and *Mr. Charles R. Hickox* were on the brief, for the Folmina:

The questions certified are predicated on the assumption

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that the steamship was seaworthy and that the damage to the cargo occurred without the fault of the master, officers or crew. The language of the certificate is conclusive on the above point. See also *The Folmina*, 143 Fed. Rep. 636.

The damage to cargo found to have been caused by the entrance of sea water into a seaworthy ship, without the ship's fault, is "a loss by a danger or accident of the sea or of navigation," within the meaning of the exception, even though it cannot be determined, under the special circumstances, just how the water got in. *Montoya et al.* v. *London Assurance Co.* (1851), 6 Exch. 451; *S. C.*, 86 R. & R. 364; *Clark* v. *Barnwell*, 12 How. 272; *The Viscount*, 11 Fed. Rep. 169; *The Majestic*, 166 U. S. 375, 386; *Patrick* v. *Hallett*, 1 Johns. 241; *Starbuck* v. *The Phœnix Insurance Co.*, 62 N. Y. Supp. 264; *Potter* v. *Ins. Co.*, 2 Sumner, 197; *Bullard* v. *The Roger Williams Ins. Co.*, 1 Curtis, 148; *Hooper* v. *Rathbone*, Taney, 519. See also *Hibernia Insurance Co.* v. *St. Louis Transportation Co.*, 120 U. S. 166, and *The G. R. Booth*, 171 U. S. 450; *The Xantho*, 12 App. Cas. 503; *Hamilton* v. *Pandorff*, 16 Q. B. D. 633; *S. C.*, 12 App. Cas. 518; *Blackburn* v. *Liverpool, Brazil & River Plate St. Nav. Co.* (1902), 1 K. B. 290; *The Southgate* (1893), Prob. 329; *The Cressington* (1891), Prob. 152; *The Glendarroch* (1894), Prob. 226; *The Exe*, 57 Fed. Rep. 886; *The Castleventry*, 69 Fed. Rep. 475, note; *Davidson* v. *Bernand*, L. R. 4 C. P. 117, 122; *Thames & Mersey Marine Ins. Co.* v. *Hamilton*, 12 App. Cas. 492; *The Ontario*, 37 Fed. Rep. 220, 225.

The true intent and purpose of the rule which ordinarily requires the carrier to give an explanation of damage to cargo, is to require him to furnish such information as he may possess, with regard to it, in order that the court may be satisfied that the loss has not resulted from his negligence or from the unseaworthiness of the ship.

Where, as in this case, it is found that a cargo damage has been caused by the entrance of sea water into the ship, during the voyage, without the negligence of the ship's officers or crew, and that the ship was seaworthy for the voyage, a *prima facie*

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case of a loss by "a danger or accident of the seas or of navigation" is made out, and the reason of the rule is satisfied, even though in the special circumstances, neither the carrier nor the most expert of surveyors could determine how the water got in the ship.

In the absence of any allegation of unseaworthiness by the shipper, or of any attempted proof of it, or of fault on the ship's part, the loss should be considered to be within the exception.

MR. JUSTICE WHITE delivered the opinion of the court.

Upon the hearing of an appeal from a decree of the District Court, Eastern District of New York, dismissing a libel, the Circuit Court of Appeals for the Second Circuit certified to this court for decision, pursuant to § 6 of the judiciary act of 1891, the following questions:

1. Whether damage to the cargo of an apparently seaworthy ship, through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of an exception in a bill of lading exempting the carrier from "The act of God . . . loss or damage from . . . explosion, heat, or fire on board . . . risk of craft or hulk or transshipment, and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature or kind."

2. Whether the ship is relieved from liability in consequence of said exception?

The facts upon which the questions arose were thus stated in the certificate:

The steamship Folmina sailed from Kobe, Japan, for New York with a large shipment of rice on board in No. 3 hold, under a bill of lading which contained the exception set out in the first of the foregoing questions, and also a provision that the ship "is not liable for sweat, rust, decay, vermin, rain or spray."

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The rice was in good order when put on board, but when discharged in New York a large part of it stowed on the starboard side of the hold was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold, which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat

A majority of the court are satisfied that the damage was caused by sea water and that it was not shown that the vessel encountered sufficient stress of weather to warrant the inference that it came in because of the action of external causes. There was no evidence tending to show any negligence, fault or error on the part of the ship's officers or crew; the cargo was well stowed and ventilated.

The Folmina was a steel steamship of the highest class in Lloyd's register. Before starting for Japan she was in dry dock at New York and was there surveyed by Lloyd's surveyor. Some time before she had been in dry dock at Cardiff, where some repairs were made to the rudder, rudder quadrant and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe.

During and after the delivery of the cargo the main deck, the between deck, the pipes leading to or connected with No. 3 hold and the shell plating in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libellants and their underwriters, and it was afterwards examined by competent and experienced surveyors representing both parties. The decks, hull, side plating and rivets of the ship were found to be sound, intact and free from leaks. No evidence (other than the mere circumstance that the damage was by sea water, if that be considered evidence) was found that there had been leaks in part of the frame, structure, side plating, riveting, pipes or appurtenances of the ship, through which water might have reached that part of No. 3 hold where the damage was done. No adequate means of access of sea

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water were found, nor any defect in the steamer which then appeared to be seaworthy.

The answer to be given to the first question will be fixed by determining upon whom rests the burden of proof to show the cause of the damage, when goods which have been received by a carrier in good order are by him delivered in a damaged condition.

As said in *Liverpool & Great Western S. S. Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 437:

"By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies. Molloy, Bk. 2, c. 2, § 2; Bac. Abr. *Carrier*, A; *Barclay* v. *Cuculla y Gana*, 3 Doug. 389; 2 Kent, Com. 598, 599; Story on Bailments, § 501; *The Niagara*, 21 How. 7, 23; *The Lady Pike*, 21 Wall. 1, 14."

And as observed in the same case:

"Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld—such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against. . . ."

It was long since settled in *Clark* v. *Barnwell*, 12 How. 272, that where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them, at the termination of the voyage, in like good order and condition, and the goods are damaged on the voyage, in a proceeding to recover for the breach of the contract of affreightment, after the amount of damage has been established, the burden lies upon the carrier to show that it was occasioned by one of the perils for which he was not responsible. But, as illustrated in the case of *The G. R. Booth*, 171 U. S. 450, proof merely of damage to cargo by sea water does not necessarily tend to establish that such dam-

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age was caused by a peril or danger of the seas. In that case the facts were that the explosion of a case of detonators, which were part of a cargo, burst open the side of the ship below the water line, and, the sea water rapidly flowing in through the opening made by the explosion, injured the plaintiff's sugar. It was held that although the explosion and the inflow of the water were concurrent causes of the damage, yet "the explosion, and not the sea water, was the proximate cause of damage, and that this damage was not occasioned by the perils of the sea within the exceptions in the bill of lading." As well observed by counsel in the argument at bar, the efficient cause of the damage sustained by the rice on board the Folmina must be sought in those conditions or events which caused or permitted the entrance of sea water. It cannot in reason be said that sea water was the efficient, the proximate cause of the cargo damage, because no other cause for that damage has been disclosed. As there must have been an efficient cause permitting the sea water to enter, so long as that cause remains undisclosed it cannot be said that the damage has been shown to have resulted from causes within the scope of a sea peril. Of course, where goods are delivered in a damaged condition, plainly caused by breakage, rust or decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be *prima facie* within the exception, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier. But in a case like the one before us, where showing an injury by sea water does not in and of itself operate to bring the damage within the exception against dangers and accidents of the sea, it follows that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against sea perils. For the distinction between the two see *The Henry B. Hyde*, 90 Fed. Rep. 114, 116; *The Lennox*, 90 Fed. Rep. 308, 309; *The Patria*, 132 Fed. Rep. 971, 972.

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The inability of the court below to determine the cause of the entrance of the sea water would imply that the evidence did not disclose in any manner how the sea water came into the ship. In other words, while there was a certainty from the proof of a damage by sea water, there was a failure of the proof to determine whether the presence of the sea water in the ship was occasioned by an accident of the sea, by negligence, or by any other cause. Manifestly, however, the presence of the sea water must have resulted from some cause, and it would be mere conjecture to assume simply from the fact that damage was done by sea water that therefore it was occasioned by a peril of the sea. As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier. *The Edwin I. Morrison*, 153 U. S. 199, 212. And see further the following cases, applying the principle just stated, and holding that because the damage to cargo was shown to have been occasioned by sea water without any satisfactory proof as to the cause of its presence, in view of the burden resting upon the carrier, conjecture would not be permitted to take the place of proof. *The Sloga*, 10 Ben. 315; *The Compta*, 4 Sawyer, 375; *Bearse* v. *Ropes*, 1 Sprague, 331; *The Zone*, 2 Sprague, 19; *The Svend*, 1 Fed. Rep. 54; *The Centennial*, 7 Fed. Rep. 601; *The Lydian Monarch*, 23 Fed. Rep. 298; *The Queen*, 78 Fed. Rep. 155, 165, 168; affirmed, 94 Fed. Rep. 189, 196; *The Phoenicia*, 90 Fed. Rep. 116, 119; *S. C.*, 99 Fed. Rep. 1005; *Ins. Co.* v. *Easton & M. Transp. Co.*, 97 Fed. Rep. 653; *The Presque Isle*, 140 Fed. Rep. 202, 205.

So far as the second question is concerned, it does not propound a distinct issue of law, but in effect calls for a decision of the whole case, and therefore need not be answered. *Chicago, B. & Q. Ry.* v. *Williams*, 205 U. S. 444, 452, and cases cited.

The first question is answered No, and the second is not answered.

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FRITZLEN *v.* BOATMEN'S BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 99. Argued January 28, 29, 1909.—Decided February 23, 1909.

If, after an order to remand has been made, it results, from the subsequent pleadings or conduct of the parties, that the cause is removable, a second application to remove can be made, and the right to make it is not controlled by the previous remanding order; nor is the granting of the order to remove under such circumstances a refusal to give effect to such previous order to remand.

In this case, *held* that in an action to foreclose, where the junior encumbrancer as plaintiff joined the senior encumbrancer as a defendant and attacked the validity of his lien, as did the owner of the property, also a defendant, a separable controversy existed between the senior encumbrancer on the one side and the owner and the junior encumbrancer on the other side, which was removable, as diverse citizenship existed when the parties were so arranged; and such removal could not be prevented either by the unnecessary joinder of the senior encumbrancer, or because prior to the filing of the reply showing the separable nature of the controversy a remanding order had been made.

Powers v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, followed as to when an application for removal is made in time.

75 Kansas, 479, affirmed.

THE facts are stated in the opinion.

Mr. D. R. Hite, with whom *Mr. H. J. Bone* and *Mr. F. C. Price* were on the brief, for plaintiffs in error.

Mr. James S. Botsford, with whom *Mr. Buckner F. Deatherage* and *Mr. Odus G. Young* were on the brief, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

On the twenty-third of July, 1903, in a court of the State of Kansas, William H. Weldon, a citizen of that State, sued

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D. G. Fritzlen and his wife Edna, also such citizens, and the Boatmen's Bank, a corporation organized under the laws and a citizen of Missouri. The cause of action against the Fritzlens was a note for $3,750, dated July 2, 1903, maturing in ten days, alleged to be secured by mortgages covering described real estate and certain live stock. The bank was made a defendant upon the averment that it claimed to have a mortgage on the real estate and personal property which secured the note sued on, and this alleged mortgage was asserted to be illegal and void, and, in any event, to be "junior and subordinate to the right, title, interest and lien of this plaintiff." Judgment for the amount of the note with interest was prayed, as also that the mortgage securing the same be decreed to be a first and prior lien over all others on the property; that so much of the property as was necessary be sold to satisfy the judgment; and that "the pretended claim, lien and interest of the said defendant, the Boatmen's Bank, be declared to be illegal and void." Summons by publication was made, calling upon the bank to answer before September 4, 1903. On July 30 Weldon applied for a temporary injunction, preventing the defendants, pending the suit, from removing any of the property beyond the jurisdiction of the court, and a restraining order was allowed. On August 13, 1903, the bank demurred to the petition, because facts adequate to establish that the mortgage by it held was invalid were not averred, and because two distinct causes of action were unlawfully joined, the one to enforce the alleged mortgage against the Fritzlens and the other assailing the rights of the bank. On the day the demurrer was filed the bank, giving the necessary bond, asked removal of the cause to the Circuit Court of the United States for the District of Kansas, on the ground that the controversy as to the validity of its mortgage was separable from the controversy concerning the enforcement of the alleged mortgage against the Fritzlens, and additionally because of local prejudice. On September 14 the Circuit Court of the United States, presided over by Lochren, J., overruled motions to remand made

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by Fritzlen and Weldon, the court basing its action upon the separable nature of the controversies and not considering the ground of local prejudice, and on that day the court dissolved the restraining order previously allowed by the state court. A copy of the order refusing to remand was filed in the state court. On the ninth of October, 1903, in the United States District Court for the District of Kansas, the bank brought an action of replevin for the possession of the personal property embraced in its mortgage, and the marshal, under a writ of replevin, took and delivered the property to the bank. More than six months after the order refusing to remand the Circuit Court of the United States for the District of Kansas, presided over by Pollock, J., granted a motion of Weldon to remand the cause to the state court. In making this order the court considered that the prior refusal to remand was not binding upon it, because it deemed the question of jurisdiction to be always open, and it was its plain duty to decline to take jurisdiction over a cause if the power to entertain it did not obtain. 128 Fed. Rep. 608.

Thereupon the bank in the state court, on May 14, 1904, withdrew its demurrer and answered. Besides denying the averments of Weldon's petition, it was alleged that the bank was the holder for value of a note of Fritzlen for $32,920.15, dated November 30, 1901, and secured by mortgage on the personal and real property referred to in the petition of Weldon, the mortgage having been recorded on December 6, 1901. It was averred that the lien of the bank was paramount to any lien resulting from the Weldon mortgage. The prayer was only this: "Wherefore, having fully answered, said Boatmen's Bank prays judgment and that it may go hence without day," and with costs in its favor. About ten days after, the Fritzlens applied to the state court for an order directing the bank to restore to them the personal property taken under the writ of replevin. The motion stated the prior issue of a restraining order; recited the facts as to the refusal to remand by Lochren, J., the bringing of the replevin suit, and the subsequent

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remanding of the cause under the order of Pollock, J. It was recited that the replevin suit had been dismissed for want of jurisdiction by the Circuit Court of the United States. Upon this motion, on the same day, the court directed the return of the property, or if sold, the deposit of the proceeds in a designated bank. As the effect of this order and the subsequent procedure concerning it is not relevant to the question which we are called upon to decide, it is not necessary to further refer in detail to the subject. Suffice it to say that the bank thereafter moved to set aside the order on the ground, among others, that the restraining order had been set aside by the Circuit Court of the United States while the case was there pending, and that although the replevin suit had been dismissed for want of jurisdiction the question of the rightfulness of the dismissal was pending before the Circuit Court of Appeals for the Eighth Circuit.

On the twenty-sixth day of May, 1904, Fritzlen answered the petition of Weldon, by admitting the debt and mortgage, but charging that all the interest claimed was not due. The answer then proceeded to set out matters which were alleged to be Fritzlen's "cause of action against his co-defendant, the Boatmen's Bank." The matters alleged on this subject were substantially as follows:

First. It was charged that the note which was held by the Boatmen's Bank embraced the sum of previous note or notes given by Fritzlen to the firm of Elmore & Cooper, and an association known as the Elmore & Cooper Live Stock Commission Company, a Missouri corporation. These previous notes, it was charged, were secured by a chattel mortgage, but were not negotiable, and had been assigned to the Boatmen's Bank, and were subject to any equity existing in favor of Fritzlen. The notes, it was alleged, were made up in considerable part of charges or commissions which had been exacted by Elmore & Cooper or the commission company for commissions relating to the sale and handling of live stock for Fritzlen at the Kansas City stock yards. These commissions, it was alleged, had been

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exacted because of an illegal combination in restraint of trade, in violation of the laws of the State of Kansas controlling the method of doing business at the Kansas City stock yards, to which Elmore & Cooper and the commission company were parties, and hence Fritzlen was entitled to recover the sum thereof. The amount of the commissions thus referred to exceeded three thousand dollars.

Second. That prior to the time when the bank had acquired the note or notes from Elmore & Cooper or the commission company, and subsequent thereto up to the time when the bank obtained the note described in its answer, it was a Missouri corporation, and had not complied with the laws of Kansas authorizing foreign corporations to do business in that State. It was charged that the dealings concerning the assignment of the notes from Elmore & Cooper and the commission company, as well as the dealings which led up to the giving of the note upon which the bank relied, as well as other transactions, constituted a doing of business in Kansas by the bank in violation of law, and therefore the note was void.

Third. That prior to the giving of the note which the bank held, negotiations had supervened between the bank and Fritzlen, having reference to the liability of the latter for the note or notes which the bank had acquired from Elmore & Cooper and the commission company. That as a result of these negotiations it had been contracted between the bank and Fritzlen that the bank would make to Fritzlen additional advances of money to enable him to carry on the business of his stock farm in Kansas, and would furnish to Fritzlen the food required to feed his stock on his ranch during the winter of 1902–1903, and that as a result of these understandings it was agreed between them that Fritzlen give a new note to the bank for the amount of its previous claims and advances, which should be secured by a chattel mortgage as well as one upon real estate, and that the note held by the bank was given as the result of this agreement. It was then charged that although the bank had repeatedly been called upon to comply

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with its contract to furnish the food for the cattle, it had failed to do so, and as a result of a sudden and rigorous blizzard in the winter of 1903 over five hundred head of the cattle perished by starvation and the remainder were reduced in value, resulting in a loss of at least twenty thousand dollars. The sum of this loss was asserted to be due by the bank to Fritzlen.

Fourth. Further, it was charged that although after the bringing of the suit by Weldon a restraining order had been by him obtained forbidding the removal of the cattle which were covered by the chattel mortgage, the bank had illegally taken possession of and removed cattle to the value of twenty-five thousand dollars, and was liable to Fritzlen to return the same or to pay their value. The answer concluded by a prayer that an account be taken by the court of the debt due by Fritzlen to the plaintiff Weldon, so as to fix the sum of the interest due thereon; that the note held by the bank and the chattel mortgage securing the same be decreed to be null and void; that an account be stated between the bank and Fritzlen without reference to the amount of the note held by the bank, so as to exclude illegal charges previously made by Elmore & Cooper and the commission company, and that the bank, in the accounting, be charged with the loss occasioned by the death or injury of cattle caused by its failure to supply food under its contract. It was additionally prayed that it be decreed that the real estate mortgage held by the bank had been completely paid, and consequently that all liens arising therefrom be decreed to be extinguished, and unless the bank returned the cattle illegally taken there also be a recovery for the full value thereof.

On the same day—May the 26th—Weldon, the plaintiff, filed his reply to the answer of the Boatmen's Bank. By such answer Weldon, in effect, set up as against the bank the same causes of action advanced by Fritzlen in his answer concerning the illegality of the note held by the bank, because it had engaged in business as a foreign corporation in the State of Kansas without complying with the state law, and because

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there had entered into the sum of the note held by the bank illegal charges previously made by Elmore & Cooper and the Elmore & Cooper Commission Company.

On June 10, 1904, the bank made its second application to remove the case, based upon the ground that the effect of the replies of Fritzlen and of Weldon was to make manifest that there was a separable controversy as to the validity of the mortgage of the bank, between Weldon and Fritzlen on the one side and the bank on the other, which was cognizable in the United States court, and moreover that it plainly resulted from the pleadings, since the entry of the order to remand made by Pollock, J., that Weldon had unnecessarily made the bank a party to his suit to foreclose against Fritzlen as the result of a conspiracy between Fritzlen and himself, for the purpose of preventing the issue as to the validity of the mortgage of the bank being tried in the courts of the United States. It was recited that the answers of Fritzlen and Weldon had been filed without notice, and the motion to remand was made at once on learning of such filing.

The court, although it found that the bond for removal was sufficient, declined to order the removal, to which the bank excepted. It is unnecessary to detail the further proceedings in the trial court. It is adequate to say that the issues between the parties were tried in part by a jury and in part by the court, and resulted in a judgment allowing in part the claim of Fritzlen against the bank, and the remainder of the claim of the bank against Fritzlen, and while giving a judgment in favor of Weldon against Fritzlen rejected the claim of Weldon as to the entire illegality of the mortgage to the bank.

The case was removed to the Supreme Court of Kansas by proceedings in error prosecuted by the various parties. Pending its determination—taking judicial notice of our own records—it is to be observed that the cause was decided which was pending in the Circuit Court of Appeals for the Eighth Circuit, resulting from the writ of error prosecuted from that court to the judgment of the Circuit Court for the District of Kansas,

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dismissing for want of jurisdiction the replevin action referred to in the previous statement. The court, while treating the order for remanding the cause made by Pollock, J., as not subject to be reviewed, nevertheless held that the effect of that order was not necessarily controlling as to the jurisdiction of the court below in the replevin action brought whilst the Weldon suit was pending in the Circuit Court of the United States in consequence of the refusal of Lochren, J., to remand. Coming to consider, as an independent question, whether the subject matter of the replevin suit was beyond the jurisdiction of the Circuit Court for the District of Kansas, it was held that the suit was clearly within the jurisdiction of the court, because the Weldon suit presented a separable controversy between Weldon and Fritzlen on the one side and the bank on the other, as to the validity of the mortgage of the bank, and that although the remanding order of Pollock, J., could not be reversed, nevertheless its effect, while operative and not open to attack, did not necessarily oust the Circuit Court of jurisdiction over the replevin action brought when the Weldon suit was pending in the Circuit Court. The judgment dismissing the replevin suit for want of jurisdiction was reversed and the case remanded for further proceedings. 135 Fed. Rep. 650. A petition praying a writ of certiorari to review this judgment was by this court denied. 198 U. S. 586.

The case pending on error in the Supreme Court of Kansas was thereafter decided. That court, without questioning the order remanding the cause made by Pollock, J., as controlling in the condition of the pleadings at the time that order was made, held that by the effect of the pleadings filed after the return of the cause in consequence of the order remanding the record presented a separable controversy, with Weldon and Fritzlen on the one side and the bank on the other, which justified the second application to remove, and therefore that application had been wrongfully refused. It in addition held that the evolution of the pleadings in the state court after the order to remand was adequate to establish *prima facie* that

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Weldon, in suing to enforce his mortgage, had joined the bank, although it was not a necessary party to that proceeding, because of a collusive conspiracy between himself and Fritzlen to enable the latter to contest with the bank the validity of its mortgage and prevent that controversy from being cognizable in the Federal courts, which would have been otherwise the case. 75 Kansas, 479. This writ of error was then prosecuted.

A motion to dismiss was postponed to the hearing on the merits. The assertion that we have power to review is based upon the proposition that the necessary effect of the judgment of the court below was to refuse to give effect to the order of the Federal court remanding the cause, which it is insisted was final and the law of the case in all subsequent proceedings, and not susceptible of being reviewed in any forum, citing *Fitzgerald* v. *Missouri Pacific R. R.*, 160 U. S. 556. But it is not open to controversy that if after an order to remand has been made it results, from the subsequent pleadings or conduct of the parties to the cause, that the cause is removable, on the development of such situation a second application to remove may be made, and the right to do so because of the changed aspect is not controlled by the previous order remanding the cause. *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92. See also *Wecker* v. *National Enameling Co.*, 204 U. S. 176. It follows, therefore, that the contention that the necessary effect of the judgment below was to refuse to give effect to the previous remanding order is without foundation. It is said, however, that as the power to entertain a subsequent motion to remove depended upon a change in the condition of the record, that the result of the judgment below was to deny all effect to the prior order remanding the cause, as there had been no such change in the record as to justify the granting of the second order to remove. To sustain this proposition it is insisted that substantially the only change that resulted from the pleadings filed after the remanding of the cause was that brought about by the filing of the answer of Fritzlen and the defenses set up in that answer against the mortgage held by the bank, which, it is argued in

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the nature of things could not operate to affect the removability of the suit between Weldon and Fritzlen. But the premise upon which the proposition rests is without foundation in fact. As we have seen, the petition of Weldon impleading Fritzlen and the bank, while it assailed the bank's mortgage in express terms, alleged that that mortgage, if it existed, was junior in rank to the mortgage of Weldon. And the serious consequences which that averment had upon the order to remand the case is indicated in the opinion of Pollock, J., sustaining the motion to remand. The necessary effect of the answer of the bank, filed after the remanding, and of the answer by Fritzlen, as well as of the answer filed by Weldon, expressly joining Fritzlen in his attack upon the mortgage of the bank, was to make clear the untruth of the averment of the junior character of the mortgage held by the bank and to establish, therefore, the fact that the bank was not an indispensable or necessary party to the suit of Weldon for the foreclosure of the mortgage against Fritzlen.

It follows therefore that the contention that the state of the record at the time the second application for removal was made was not materially different from the condition existing when the prior order to remand was allowed, is unwarranted. So far as the separable nature of the controversy is concerned, arising on the record as it existed at the time the second application to remove was made, we might rest content with saying that we think the removal was rightly allowed, for the reasons stated in the opinion of the court below and in that of the Circuit Court of Appeals for the Eighth Circuit in *Boatmen's Bank* v. *Fritzlen, supra,* and the authorities there cited. We observe, however, that under the case made, as the bank was not an indispensable party to the suit of Weldon to foreclose, the mere fact that the bank was by him joined as a defendant along with Fritzlen cannot be held to operate to prevent the application of the rule of separable controversy, and that from its application we think it quite clear that the validity of the bank's mortgage, assailed as it was under the cir-

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cumstances of the case, was a separable controversy with Weldon and Fritzlen on one side and the bank on the other, and it was therefore rightly the subject of removal. Without stopping to give the reason for our conclusion, we also think it is quite clear, within the ruling in *Powers* v. *Chesapeake & O. Ry. Co.*, *supra*, that the second application to remove was made in time.

While the views just expressed might justify granting the motion to dismiss, yet in consequence of the character of the question (*Swafford* v. *Templeton*, 185 U. S. 487), instead of dismissing, our decree will be,

Affirmed.

MATTER OF DUNN.

APPLICATION FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE EDWARD R. MEEK, DISTRICT JUDGE &C.

No. 10, Original. Argued January 11, 1909.—Decided February 23, 1909.

As a corporation created by act of Congress derives all its rights from the law creating it, suits brought against it, on account of its action, arise under the Constitution and laws of the United States and are removable into the Federal court. *Osborn* v. *Bank of United States*, 9 Wheat. 738.

This court will judicially notice that a defendant corporation was incorporated by an act of Congress even though the petition fails so to do.

The right to remove depends upon whether the suit could have been brought originally in the Circuit Court of the United States. *Cochran* v. *Montgomery County*, 199 U. S. 260.

Where the Circuit Court has jurisdiction by reason of the fact that the defendant is a corporation created by an act of Congress, the joinder of other defendants, citizens of plaintiff's State does not prevent removal to the Circuit Court if there is no separable controversy and all the defendants unite in the petition: the Federal character permeates the entire case and affects all parties defendant.

When this court is called upon to exercise its own judgment, it will not be controlled by decisions of state courts.

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Notwithstanding that it maintains an office in another State, the defendant corporation which was organized under an act of Congress is suable in the district designated by it as where its office is located and in which its agent resides and its directors meet to affirm their acts adopted in the other State.

The application of § 10 of the act of March 11, 1902, 32 Stat. 68, c. 183, is not limited to local actions described in § 8 of the act of March 3, 1875, c. 137, 18 Stat. 470.

THIS is an original application to this court for a rule, directed to the District Judge of the United States for the Northern District of Texas, directing him, and also the Circuit Court of the United States for that district, to show cause why a mandamus should not issue, commanding that judge and that court, and each of them, to remand a certain action at law to the District Court of Dallas County, Texas, and to desist from exercising any further jurisdiction in the action, except the entering of the order remanding it to the state court. Upon such application a rule was made by this court that the judge and the court should show cause, in accordance therewith.

Upon service of the rule being made, a return has been duly filed by the District Judge, acting for himself and as judge of the Circuit Court.

In the papers used upon the application for the writ and in the return of the District Judge made thereto the following facts are set forth:

An action was brought in the state court in the county of Dallas, and State of Texas on the first day of August, 1907, against the Texas and Pacific Railway Company and two individuals, C. W. Slayter and Carl Rasmussen, who were, respectively, engineer and fireman on the Texas and Pacific Railway, to recover damages for the negligent killing of J. J. Dunn, the husband of one of the plaintiffs and the father of others. The action was brought against the company and the individual defendants jointly, and the petition in the state court alleged that the plaintiffs resided in Dallas County, Texas, of which county the plaintiffs were inhabitants and residents and that

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the defendant the Texas and Pacific Railway Company, was a corporation duly incorporated, with an office and local agent in Dallas County, Texas; that the defendant Slayter was a resident and citizen and inhabitant of Harrison County, in said State, and that the defendant Rasmussen was also a resident, citizen and inhabitant of Harrison County, in the said State. The petition then alleged that Dunn was killed directly and approximately through the negligence of the defendants, who were guilty of negligence in permitting and causing the engine and train to run into, against and over the said Dunn and injuring him so that he was instantly killed. The petition then averred certain particular acts of negligence on the part of the defendants and sought to recover from them on account of such negligent killing the sum of $85,000. All of the defendants were duly served with process, and within the time required by law they all joined in a petition to the state court to remove the cause to the Circuit Court of the United States for the Northern District of Texas (which included Dallas County) and presented bonds for such removal. The ground for the removal was alleged to be that the Texas and Pacific Railway Company was a corporation organized and existing under the laws of the United States by virtue of "An act to incorporate the Texas and Pacific Rail Road Company and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and acts amendatory thereof and supplemental thereto, by one of which the name and style of the company was changed to the Texas and Pacific Rail*way* Company. The petition alleged that the matter in dispute in the case exceeds, exclusive of interest and costs, the sum of two thousand dollars, and that the suit arose under the laws of the United States, and more especially under the law of the United States constituting the charter of the defendant and under which it was incorporated; that under the laws of the United States the Circuit Court of the United States for the Northern District of Texas had original jurisdiction of the suit. To the granting of this application the plaintiffs objected, among other things, upon the ground that

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the plaintiffs had not the right, at the time of the commencement of the suit, to bring it in the Circuit Court of the United States for the Northern District of Texas against either of the defendants Slayter and Rasmussen, and that it appears, from the plaintiff's petition in the case that it is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of either of the individual defendants, nor at the instance of the railway company; and that it also appears, from the defendant's own petition for the removal, that the case is not removable to the Circuit Court of the United States for the Northern District of Texas at the instance of either the defendants Slayter, or Rasmussen, or even at the instance of the defendant railway company, or of all of them together.

The state court, while holding that the petition to remove to a Federal court was in all respects regular, and that it was filed in due time, and that a good and sufficient bond had been filed, held that the petition did not show proper grounds for removal of the suit, and the application for removal was denied.

Thereupon the defendants in the suit in the state court, on January 13, 1908, filed in the office of the clerk of the Circuit Court of the United States for the Northern District of Texas, at Dallas, Texas, a copy of the record in that suit. Before any other proceedings were had in the case in the Circuit Court of the United States, and on the twentieth of January, 1908, the plaintiffs filed in that court a motion to remand the case. While expressly denying that the Circuit Court had jurisdiction of the case, the plaintiffs moved the court to remand it, for the reason that the suit did not properly involve a dispute or controversy properly within the jurisdiction of the court, because, as was said, it did not appear from the record or from the defendant's petition to remove the cause that any of the defendants were inhabitants of the Northern District of Texas, and that there was no denial by the defendants of plaintiffs' allegation that the individual defendants Slayter and Rasmussen were inhabitants of Harrison County, Texas, which county is in the Eastern Dis-

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trict of Texas. It was also averred that it appeared upon the face of the record that there was no separable controversy as to either or any of the defendants. The plaintiffs further averred that the railway company had its principal office in the City of New York, in the Southern District of New York, and State of New York, of which district it was an inhabitant, and that it was not an inhabitant of the Northern District of Texas, and could not be sued by the plaintiff in that district by reason of its being a Federal corporation, hence it had not the right to remove the cause to the Federal court.

The defendants answered the petition to remand, and averred that the railway company was a resident of and had its domicil in the Northern District of Texas, and that the individual defendants were jointly sued with the railway company, a resident of the District of Dallas. That no claim of separable controversy or diverse citizenship was made, but the application to remove was based upon the existence of a Federal question as to all of the defendants. That although the plaintiffs' petition in the case simply alleged that the railway company was a corporation duly incorporated, yet defendants alleged that it had an office and local agent in Dallas County, Texas, and it was urged that the court would take judicial notice of the Federal character of the defendant, notwithstanding the plaintiffs had neglected to allege it; and that the record showed a general liability charged by the plaintiffs as against all the defendants, and that the Federal question as to all of such defendants was thereby raised.

The motion made by the plaintiffs to remand the cause came on to be heard by the District Judge holding the Circuit Court, and was overruled and denied.

No further proceedings have been had in the case in the Circuit Court of the United States, and the case also stands upon the docket of the state court, subject to call and disposition.

Upon application, the Circuit Court issued an injunction restraining the plaintiffs from continuing any proceedings in the state court in the action.

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A motion was made to dissolve the injunction, which was denied. *Madisonville &c.* v. *Saint Bernard &c.*, 196 U. S. 239.

The plaintiffs insist that mandamus is the only adequate remedy under the facts stated, by which they can obtain relief and proceed with the trial of their cause in the state court.

Mr. C. W. Starling for petitioners:

If upon the face of the record as made in the state court the case was not removable, jurisdiction of the Circuit Court has not attached. *Crehore* v. *O. & M. Ry. Co.*, 131 U. S. 240. There is no preliminary question of law or of fact, as in *Re Pollitz*, 206 U. S. 323, or as in *Ex parte Nebraska*, 209 U. S. 436, which calls for the exercise of judicial discretion of the Circuit Court. *Ex parte Wisner*, 203 U. S. 449, controls.

Where only one of two defendants, if sued alone, has a right, because of a Federal question affecting it, to remove a case, there being another or other defendants who if sued alone had no right of removal, such right does not exist because all defendants join in the application to remove.

A suit against an employé of a Federal corporation, arising by reason of his conduct while in the line of duty, is not one arising under the Constitution and laws of the United States, unless it appears from plaintiff's petition that the conduct in question is of such a character that it is in some manner defined or affected by Federal law.

A suit against a Federal corporation and an individual employé instituted in good faith, arising by reason of their alleged joint negligence, is not removable to the Federal court on account of the Federal character of such corporation. *Texas & Pacific Ry. Co.* v. *Huber*, 92 S. W. Rep. 833; *Eastin & Knox* v. *Texas & Pacific Ry. Co.*, 92 S. W. Rep. 838; *Chicago, Rock Isd. & P. Ry.* v. *Martin*, 178 U. S. 245; *Strawbridge* v. *Curtis*, 3 Cranch, 267; *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 203; *Blake* v. *McKim*, 103 U. S. 336; *Western Union Telegraph Co.* v. *Ann Arbor Ry. Co.*, 178 U. S. 239; *Gableman* v. *Peoria Co.*, 179 U. S. 335; *Hanrick* v. *Hanrick*, 153 U. S. 192;

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Torrence v. *Shedd*, 144 U. S. 527; *Whitcomb* v. *Smithson*, 175 U. S. 635; *L. & N. Co.* v. *Wangelin*, 132 U. S. 599; *Albany G. S. R. Co.* v. *Thompson*, 200 U. S. 216.

If the Texas & Pacific Railway Company is an inhabitant of the Southern District of New York, suit against it cannot, except by its consent, be maintained in the Circuit Court for the Northern District of Texas, provided jurisdiction is dependent solely upon a Federal question, and therefore such company as defendant cannot remove a case from the state court to such Circuit Court over the objection of the plaintiffs. *Ex parte Wisner*, 203 U. S. 449; *In re Keasbey & Mattison Co.*, 160 U. S. 219; *Wolf* v. *C. O. & G. Ry. Co.*, 133 Fed. Rep. 601; *Sunderland Bros.* v. *C., R. I. & P. Ry.*, 158 Fed. Rep. 878.

The Texas & Pacific Railway Company is an inhabitant of the Southern District of New York, and not of the Northern District of Texas. *Galveston, H. & S. A. R. Co.* v. *Gonzales*, 151 U. S. 507; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 144; *Orange Nat. Bank* v. *Craven*, 7 Fed. Rep. 149; *Bank* v. *Deveaux*, 5 Cranch, 66; *Northern Pac. Ry. Co.* v. *Amato*, 144 U. S. 465; *U. P. Ry. Co.* v. *Harris*, 158 U. S. 326; *Wolf* v. *C. O. & G. Ry.*, 133 Fed. Rep. 601.

Applying the rule governing citizenship of state corporations, which is that they are presumed to be citizens of the State in which they are incorporated, and of the district in which their principal office is located, the citizenship and inhabitancy of this railway company should be presumed to be where it keeps open its books for subscription to its capital stock and where its stockholders meet pursuant to the by-laws and transact their business. *Texas & Pac. Ry. Co.* v. *Commission*, 162 U. S. 197; *St. Louis & S. F. Ry. Co.* v. *James*, 161 U. S. 562; *Patch* v. *Wabash Ry.*, 207 U. S. 277; *Memphis & C. R. Co.* v. *Alabama*, 107 U. S. 581.

As the individual defendants are shown by the record to be inhabitants of the Eastern District of Texas, plaintiffs could not have sued them jointly with the railway company in the Northern District of Texas; they did not have the right to remove or

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to join in the petition to remove the cause to the Circuit Court for the Northern District of Texas. *Greeley* v. *Lowe*, 155 U. S. 72.

Although a suit against a Federal corporation is *prima facie* a suit arising under the Constitution and laws of the United States, so as to confer jurisdiction thereof upon the Circuit Court, it may be shown by a proper pleading, challenging the jurisdiction, that such suit does not involve a substantial controversy of this character, and if such pleading is interposed, before jurisdiction is assented to by such proceedings as practically admit that the suit does involve a substantial controversy of this character, and it then appears that there is no such substantial controversy, the case should be dismissed for want of jurisdiction. See opinion of Chief Justice Marshall in *Osborn* v. *Bank*, 9 Wheaton, 827; and see also *U. P. Ry. Co.* v. *Meyers*, 115 U. S. 1; *Texas & Pacific Ry. Co.* v. *Cody*, 166 U. S. 606; *St. J. & G. I. Ry. Co.* v. *Steele*, 167 U. S. 659.

Mr. Rush Taggart, with whom *Mr. John F. Dillon* and *Mr. W. L. Hall* were on the brief, for respondent:

The removal of this cause to the Federal court was in exact accordance with the provisions of the act of March 3d, 1887, as corrected by the act of August 13th, 1888. *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Oregon Short Line &c. Ry.* v. *Skottowe*, 162 U. S. 490; *Texas & Pacific Ry. Co.* v. *Cody*, 166 U. S. 606; *Texas & Pacific Ry. Co.* v. *Barrett*, 166 U. S. 617; *Smith* v. *Union Pacific Ry.*, 2 Dillon, 278; *Bank of United States* v. *Deveaux*, 5 Cranch, 61; *Bank* v. *Martin*, 5 Pet. 479; *Osborn* v. *Bank*, 9 Wheat. 738; *Curtin* v. *Union Pacific R. R.*, 3 Dillon, Circuit Court, Rep. 366. The action does not cease to be one arising under the laws of the United States because other parties are sued jointly with the Texas & Pacific Railway. *Fisk* v. *Union Pacific R. R. Co. et al.*, 8 Blatchford, 243; *Landers* v. *Felton et al.*, 73 Fed. Rep. 311; *Lund* v. *Chicago, R. I. & Pac. R. R. et al.*, 78 Fed. Rep. 385; *Martin* v. *St. L. S. W. Ry. et al.*, 134 Fed. Rep. 134.

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Relator's contention that the suit could not originally have been maintained against the Texas & Pacific in the Northern District of Texas and against Slayter and Rasmussen is not well founded.

Under the first section of its charter the right to sue and the obligation to submit to suit in any court of law or equity within the United States is expressly provided for therein, and the charter was accepted by it, subject to that obligation. The right to sue it in the United States Circuit Court in the Northern District of Texas would not be dependent upon its consent, but upon the fact whether it was doing business within that district, and had an agent there upon whom service could properly be made. If such conditions existed, then it could be properly served with process, and when so served the Circuit Court would have jurisdiction over it under § 1 of its charter, and the principle of the following cases. *Lafayette Ins. Co.* v. *French*, 18 How. 404; *St. Clair* v. *Cox*, 106 U. S. 98; *Fitzgerald Co.* v. *Fitzgerald*, 137 U. S. 98; *Mexican Central Ry. Co.* v. *Pinkney*, 149 U. S. 194; *In re Hohorst*, 150 U. S. 653.

The fact that the individual defendants, Slayter and Rasmussen, were residents of the Eastern District of Texas, under § 10 of the act of 1902, would not interfere with getting service upon them, because the clauses of § 1, of the act of March 3, 1887, regulative of the exercise of the jurisdiction of the Circuit Court, and limiting the right to suit in the Federal courts to the district in which the defendant is an inhabitant, would not have application to these persons in that case, for the reason that special provision is made in the subsequent act of 1902 for service of writs in the different districts into which the State of Texas is divided. If the plaintiff saw fit to sue the Texas & Pacific Railway Company, in the Northern District where service could be had upon it, and join with that company, Slayter and Rasmussen, the clerk of that court would have the right to issue writs for the other defendants to the other districts, and thus, that feature of the objection to the original jurisdiction of this case in this Northern District of Texas is entirely eliminated.

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MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

It is agreed by all that there is in this case no separable controversy, and the important question is whether, upon the facts stated, a removal can be ordered, notwithstanding the individual defendants were made parties to the suit, and were not residents or inhabitants of the Northern District of Texas when sued.

The question arises under the act of Congress of 1888, relative to the removal of cases from state to Federal courts. 25 Stat. 433, chap. 866. This act, as its title shows, was passed for the purpose of correcting the enrollment of the act approved March 3, 1887, 24 Stat. 552, chap. 373, which amended the act approved March 3, 1875, 18 Stat. 470, chap. 137. The first clause of the first section of the act of 1888 gave to the Circuit Courts of the United States "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . ."

The second section of the act provided "that any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district. . . ."

If the question were as to the right to remove a case to the Federal court where the sole defendant was a corporation created by an act of Congress, there can be no dispute as to the right of such a defendant to claim the removal. As the corpo-

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ration derives all its rights from the law of Congress, a suit brought against it on account of its action arises under the Constitution or laws of the United States. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 817, 828; *Pacific Railroad Removal Cases*, 115 U. S. 1. See also act of incorporation of the Texas & Pacific Railroad Company, 16 Stat., p. 573, c. 122, March 3, 1871, giving the right to the corporation (p. 574, § 1) to sue and be sued in all the courts of law and equity within the United States.

The right to remove, under the statute, depends upon whether the suit could originally have been brought in the Circuit Court of the United States. *Traction Company* v. *Mining Company*, 196 U. S. 239, 245; *Cochran &c.* v. *Montgomery County*, 199 U. S. 260.

The question then is whether the United States Circuit Court for the proper district (Northern District of Texas) would have had jurisdiction of a suit commenced in that district by the plaintiffs against the railway company and the two individual defendants. A suit against the company would, as we have seen, be one arising under the Constitution or laws of the United States, and as the individual defendants resided in the State of Texas (the same State as the plaintiffs) the ground of jurisdiction of the Federal court as to them must be that by joining all as defendants in a joint action for the same wrong done by all of them, the plaintiffs thereby made the suit against the individual defendants also one which arises under the Constitution or laws of the United States.

The plaintiffs themselves have made the act of which they complain a joint one, and, being one which arises under the Constitution and laws of the United States as to one of the defendants, it becomes so as to all, because it is joint. The Federal character permeates the whole case, including the individual defendants as well as the corporation. The case which plaintiffs make in their petition in the suit must determine the character of the cause of action. *Alabama Great Southern Railway* v. *Thompson*, 200 U. S. 206, 216. The acts of the indi-

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vidual defendants were not necessarily in and of themselves inherently of a Federal nature.

In *Landers* v. *Felton*, 73 Fed. Rep. 311, the question arose whether an action brought against the receiver of a United States court, and others who were citizens of the same State as that of the plaintiff, to establish a joint liability of all the defendants, was a suit arising under the laws or Constitution of the United States. The court held that it was, saying: "No separate liability could be asserted against the receiver, except by virtue of the same laws. Therefore the joint liability of the defendants with the receiver arises under the laws or Constitution of the United States. If the plaintiff wished to sue the other defendants without joining the receiver, he had his election to do so, because the liability of joint tort feasors is also several. He might, therefore, have maintained his action against the resident defendants in a state court, without any possibility of removal to a Federal court. He elected, however, to join the resident defendants with a person against whom he could establish no liability, in the capacity in which he sues him, except by virtue of the laws of the United States. Therefore the joint cause of action which he asserts against all the defendants must find its sanction in the Federal statutes. Hence, the cause of action is removable. The state court was in error in denying the petition of the receiver, and the motion to remand is overruled."

In *Lund* v. *Chicago &c. Railway Co.*, 78 Fed. Rep. 385, a suit was brought in the state court against that company, together with the Union Pacific Railway Company and its receivers. One was a state and the other a United States corporation. The Union Pacific, by its receivers, filed a petition for removal of the cause, and a motion to remand was made, and it was urged that the cause was not removable because the state corporation was joined with the Union Pacific, and that as to the state corporation no Federal law was involved, and it could not remove the cause to the Federal court. The court held the defense was not well taken; that the statute organizing the

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Union Pacific Railway necessarily involved a Federal law, and as it was a joint cause of action it was clear that the whole case arose under the Federal law; that while a suit against the Rock Island Company, the state corporation, could have been maintained without reference to the Federal laws, yet, as it was sought to hold the Union Pacific Railway Company and its receivers jointly with the state company, then a new character was given to the action and a new element was introduced, to wit, the laws of the United States; therefore as it was necessary in order to maintain the action against the defendants jointly to invoke the Federal law, the case was one arising under the laws of the United States, and hence the whole case was removable under the statute. In such case it was said the Federal question affects all parties defendant in the suit, entitling it to be removed where all the parties unite in the petition. *Martin* v. *St. Louis &c. Ry.*, 134 Fed. Rep. 134, is to same effect. And see *Fish* v. *The Union Pacific Railroad Company*, 8 Blatch. 243, per Circuit Justice Nelson and Judge Blatchford, opinion by Justice Nelson, upon question of removal, where the case arises out of the Constitution or laws of United States, although some of the defendants could not themselves apply to remove it.

We are aware that a different view has been taken of the rights of defendants, situated like those in this case by the Supreme Court of the State of Texas in *Texas & Pacific &c. Co.* v. *Huber*, 100 Texas, 1; *S. C.*, 92 S. W. Rep. 832 (May 2, 1906); *Eastin & Knox* v. *Texas &c. Co.*, 99 Texas, 654; *S. C.*, 92 S. W. Rep. 838 (May 2, 1906); but as this is a case where we are called upon to exercise our own judgment, we have come to a different conclusion, notwithstanding our great respect for the decisions of the courts of that State.

Although the plaintiffs in their original petition in the state court state that the railway company was a corporation, duly incorporated, with an office and local agent in Dallas County, Texas, the fact that the corporation was incorporated by an act of Congress will be noticed by the court, even without an averment of that fact in the petition. *Texas & Pacific Ry. Co.*

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v. *Cody*, 166 U. S. 606, 610; *Texas &c. Ry.* v. *Barrett*, 166 U. S. 617.

In *Chicago &c. Railway Co.* v. *Martin*, 178 U. S. 245, the action was brought by the administrator of William Martin against the Chicago, Rock Island and Pacific Railroad Company (a state corporation), Clark and others, and the receivers of the Union Pacific Railway Company, in the District Court of Clay County, Kansas, to recover damages for the death of decedent. The Union Pacific Railway was a Federal corporation, and its receivers were appointed by the Federal court. Application to remove the cause to the Federal court was made by the receivers of the Union Pacific, which application was not joined in by the state corporation, and the application was denied, because all the defendants were charged with jointly causing the death of plaintiff's intestate, and all did not join in the petition for removal. The case was tried and judgment obtained for the plaintiff in the state court, and was taken on error to the Supreme Court of Kansas and there affirmed. 57 Kansas, 437. In this court the Chief Justice, speaking for the court, said: "Assuming that as to the receivers the case may be said to have arisen under the Constitution and laws of the United States, the question is whether it was necessary for the Chicago, Rock Island and Pacific Railroad Company, defendant, to join in the application of its co-defendants, the receivers of the Union Pacific Railway Company, to effect a removal to the Circuit Court." Upon consideration of the removal statutes it was held that it was necessary for the state corporation to join in the application. Here all of the defendants have joined, and, as we have seen, they are all under the circumstances able to assert and claim the right of removal of the cause to a Federal court. It was held in the *Martin case, supra*, that there was no separable controversy, and so failure of all the defendants to join could not be excused.

Some further objections are taken to the right of plaintiffs to maintain this suit in the Federal court, and therefore to the right of the defendants to remove from a state court. The

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objection is that the defendants Slayter and Rasmussen were not residents in the Northern District of Texas, but, on the contrary, were residents of the Eastern District, and consequently could not be sued in the former district; and also that the railway company was not a resident of the State of Texas, but was a resident of the Southern District of the State of New York. Upon the latter question the facts on deposition before the United States district judge in Texas showed that the company maintained an office in Dallas County, Texas, and that the senior vice president lived in Dallas, and that for many years the company had designated Dallas as its general office, and that all the acts of the board of directors taken in New York city are subsequently affirmed by the meeting of the board at Dallas before they are considered effective. We are of opinion that the defendant company was liable to suit in the Northern District.

By § 10 of the act of Congress entitled "An Act to divide the State of Texas into four judicial districts," approved March 11, 1902, 32 Stat. 68, c. 183, provision is made for the service of process against defendants, and if there be more than one defendant, and they reside in different divisions of the district or in different districts, the plaintiff can sue in either division or in either district in which one or more of the defendants may reside, sending a duplicate writ or writs to the other defendant or defendants, upon which the clerk shall indorse that the writ thus sent is a copy of a writ sued out of the court of the proper division of said district.

Articles 1222 and 1223 of the Civil Statutes of Texas provide for the service of process in suits against incorporated companies or foreign public or private corporations.

Under these various statutes the plaintiffs would have had the right to sue the Texas and Pacific Railway Company in the Northern District of Texas, because it was a resident of and doing business in that district, and had an agent there upon whom service could properly be made.

The individual defendants Slayter and Rasmussen, being

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residents of the Eastern District of Texas, could, under § 10 of the act above mentioned, be served with duplicate writs, and so the Circuit Court would obtain jurisdiction over them also.

We do not think that the tenth section of the act of 1902, *supra*, should be limited so as to apply only to local actions of the class described in § 8 of the act of 1875. 18 Stat. 470, ch. 137. That section relates to suits commenced to enforce any legal or equitable lien or claim to or to remove any incumbrance or cloud upon real or personal property in the district where such suit is brought. The first part of § 10 does not so limit its application, while the latter part makes special provision for suits and actions affecting the title to real estate, which directs that the action must be brought where such real estate is in whole or in part situated.

We are of opinion that the Circuit Court of the United States obtained jurisdiction by the proceedings for the removal of the case to that court, and the rule to show cause is therefore discharged and the proceedings in this court to obtain a mandamus are

Dismissed.

MR. JUSTICE HARLAN dissented.

BRADFORD v. MORRISON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 60. Argued January 7, 1909.—Decided February 23, 1909.

The title of a locator to a mining claim located under § 2322, Rev. Stat., is not only property, but property which, in addition to being sold, transferred and mortgaged, is also capable of being inherited without infringing the title of the United States.

Under the laws of Arizona, in force at the time, real property upon which a judgment was a lien included mining claims.

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Title to a mining claim acquired by sale under lien of judgment is subject to forfeiture if conditions subsequent, such as the doing of necessary work, are not performed.

Black v. *Elkhorn*, 163 U. S. 445, holding that widow's dower did not attach under the law of Montana to the mining claim involved in that case, distinguished.

THIS is an appeal from a judgment of the Supreme Court of the Territory of Arizona, affirming a judgment of the District Court of Yavapai County, in that Territory, quieting the title to several mining claims involved in the action.

The appellant brought the action for such purpose under the provision of a statute permitting it, against Morrison, the appellee, together with Elmer R. McDowell and Thomas D. Bennett. McDowell and Bennett made default, but Morrison, the appellee, as the assignee of Bennett, duly filed his amended answer, which contained a special denial that the appellant was the owner of the property described in her complaint, and he then set up that he was the assignee of one Thomas D. Bennett of a certain judgment, which was recovered in the same court in which this proceeding or action was brought, which judgment was for the sum of $2,730.25, and was against the two individuals, Tom Taylor and E. G. Wager, which was docketed December 30, 1899. The case was submitted to the trial court on an agreed statement of facts, and the trial resulted in a judgment quieting plaintiff's interest in the undivided three-fourths of the claim as against the defendants, and quieting appellee Morrison's title as against plaintiff and the other defendants in the remaining one-fourth of such claim.

An appeal taken to the Supreme Court of the Territory resulted in the affirmance of the judgment, and the plaintiff then took an appeal to this court upon a statement of facts found by the Supreme Court.

From this statement of facts it appears that the mining claims in controversy are unpatented lode claims. The judgment in *Bennett* v. *Wager* was rendered December 23, 1899,

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and docketed December 30, 1899. On December 23, the day of the recovery of the judgment, and continuously thereafter until August 27, 1900, the actual coöwners and possessors of the mining claims were one D. C. Wood, the owner of a one-half interest, and E. G. Wager and Reese M. Ling, each a one-quarter interest. It is in regard to Wager's interest in the claims at that time, December 30, 1899, that the controversy has arisen.

On August 27, 1900, Wood, Wager and Ling, by mining deed, conveyed their interest in the claims to the McCabe Extension Mining & Milling Company, a corporation, and contemporaneously with the delivery of that deed the grantors placed the corporation in the actual and exclusive possession of the claims. The corporation, and its assignee, the plaintiff, ever since that time have been in the actual and exclusive possession of the claims, and have performed each and every year since the year 1900 to the date of the findings, which were filed January 23, 1907, annual labor in excess of the amount of $100 per annum upon each of said claims, and the corporation has during its possession of the claims expended more than $40,000 in improvements in and on the mines.

Neither Wager, Wood nor Ling has been in possession of the claims since August 27, 1900, when they conveyed them to the corporation.

The appellant claims under conveyance executed pursuant to judicial sales made under writs issued on a judgment obtained against the corporation subsequently to the conveyance made to it, and appellant is in the present actual and exclusive possession of the claims. Under one of these sales a deed was executed and delivered to her on October 26, 1904, which, it is said, related back to November 6, 1902, the date of the filing of the lien of the judgment against the company. On November 29, 1904, an execution was issued on the judgment in *Bennett* v. *Wager et al.*, and levied upon the interest which Wager had in the claim at the time judgment was recovered against him (December 30, 1899), and the sale was made un-

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der that levy, December 22, 1904, to the appellee Morrison, and a certificate of sale was issued to him for that interest.

Mr. E. M. Sanford for appellant:

The docketing of the Bennett-Wager judgment on December 30, 1899, did not create a general lien on the unpatented mining claims in controversy. Without the aid of the statute there can be no lien under the term "real property" upon chattels, real or equitable estates, without the addition of equivalent language which would include such chattels and estates. *Jeffrey* v. *Moran*, 101 U. S. 285; *Merry* v. *Hallet*, 2 Cowen, 498; *Westervelt* v. *The People*, 20 Wend. 417; *People* v. *Irwin*, 14 California, 434; *Riley* v. *Nance*, 31 Pac. Rep. 1126; *Sommerville* v. *Stockton &c. Co.*, 76 Pac. Rep. 246; 2 Freeman on Judgments (4th ed.), § 348.

At common law a judgment was not a lien on mere equitable estates. *Massingdale* v. *Downes*, 7 How. 760; *Morsell* v. *Bank*, 91 U. S. 360; *Cooke* v. *Avery*, 147 U. S. 389; 12 Am. Enc. of Law (1st ed.), 103, note 3; *Sommerville* v. *Stockton Milling Co.*, 76 Pac. Rep. 246; *Bloomfield* v. *Easton*, 45 Pac. Rep. 681; *Merry* v. *Hallet*, 2 Cow. 497; *In re Estes*, 3 Fed. Rep. 141; *Sweezy* v. *Jones*, 21 N. W. Rep. 47; *Nessler* v. *Neher*, 26 N. W. Rep. 47; *Jenkins* v. *Fahey*, 73 N. W. Rep. 362.

As to the nature of the interest which a judgment debtor holds as locator or assignee of the locator, in an unpatented mining claim, see *Black* v. *Elkhorn &c. Co.*, 163 U. S. 445; Ballinger on Mines, 54; 10 Am. & Eng. Enc. of Law (2d ed.), 404, note 1; *Salem &c. Co.* v. *Stayton &c. Co.*, 33 Fed. Rep. 154; *McAllister* v. *Hutchinson*, 75 Pac. Rep. 41; *Wheeler* v. *West*, 11 Pac. Rep. 73; *Cowles* v. *Kidder*, 41 Pac. Rep. 16; 13 Am. & Eng. Enc. Law (1st ed.), 539; Lindley on Mines, 860; *Benson &c. Co.* v. *Alta &c. Co.*, 145 U. S. 128.

Mr. Robert E. Morrison, appellee, *pro se*, submitted:

Unpatented mining claims, for the purpose of establishing a judgment lien thereon, are included under the term "real

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property," as used in the statute herein in question. See Title XII, R. S. A., 1901, Conveyances, §§ 1 and 13; *Forbes* v. *Gracey*, 94 U. S. 762; *Belk* v. *Meagher*, 104 U. S. 279; *McFeters* v. *Pierson*, 24 Pac. Rep. 1076; *Hopkins* v. *Noyes*, 2 Pac. Rep. 280; 2 Washburn on Real Property, 517.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The appellant asserts that no lien was created against the interest of E. G. Wager (the judgment debtor), in the unpatented claims in controversy by reason of the docketing of that judgment on the thirtieth of December, 1899. She also asserts that there was an abandonment in fact and in law by Wager of his interest in the mining claims, by reason of the making and delivery of the deed by himself and others, dated August 27, 1900, to the corporation mentioned and by contemporaneously therewith putting the company in the peaceful and exclusive possession of the claims. She further urges that the levy made under the execution of November 27, 1904, issued upon the judgment in *Bennett* v. *Wager*, created no special lien against the property that related back to the docketing of the judgment and that the sale of Wager's interest in the mining claims under that execution to the appellee vested in him no interest or title prior or paramount to the interest, possession and title of the appellant, and generally the appellant asserts that the judgment appealed from is contrary to law, in that an unpatented mining claim is not the subject of a judgment lien, and if it were, the lien was destroyed by the judgment debtor's abandonment of the claim on August 27, 1900.

The statute under which the question arises is Act No. 50 of the Session Laws of 1891 of the Territory of Arizona, page 50, § 4, which reads as follows:

"Every such judgment when so docketed shall, for a period of five years from the date of the rendition thereof, be a lien on the real property in the county where the same is docketed,

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except the homestead, of every person against whom such judgment shall be rendered and docketed and which he may have at any time thereafter within said period of five years."

Now, at the time of the docketing of this judgment E. G. Wager, the judgment debtor, was the owner of the undivided one-quarter interest, of record, in the mining claims named in the complaint, and the appellee contends that these unpatented mining claims were real property within the meaning of the above statute, for the purpose of establishing a judgment lien thereon.

The character of the possession of mining claims and the title under which they are held has been frequently adverted to in the decisions of this court, as well as in the many decisions of the courts of what may be termed "mining" States and Territories.

By § 2322 of the United States Revised Statutes it was enacted that "The locators of all mining locations heretofore made or which shall hereafter be made on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth; . . ." 2 Comp. Stat. 1425.

In *Forbes* v. *Gracey*, 94 U. S. 762, 767, it is said the claims of this nature "are the subject of bargain and sale, and constitute very largely the wealth of the Pacific Coast States. They are property in the fullest sense of the word, and their ownership, transfer and use are governed by a well-defined code or codes of law, and are recognized by the States and Federal Government. This claim may be sold, transferred, mortgaged and inherited, without infringing the title of the United States."

In *Belk* v. *Meagher*, 104 U. S. 279, it was held that actual possession of the claim was not essential to the validity of the title obtained by a valid location, and until such location was terminated by abandonment or forfeiture no right or claim to the property could be acquired by an adverse entry thereon with

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a view to the relocation thereof. Mr. Chief Justice Waite, in delivering the opinion of the court, referred to the language used in *Forbes* v. *Gracey*, *supra*, and reaffirmed the same.

In *Manuel* v. *Wulff*, 152 U. S. 505, 510, Mr. Chief Justice Fuller, in delivering the opinion of the court, again repeated the language in *Forbes* v. *Gracey*, *supra*, and again reaffirmed its correctness (at page 510). To the same effect is *Elder* v. *Horseshoe Mining & Milling Co.*, 194 U. S. 248; and see *Elder* v. *Wood*, 208 U. S. 226.

We thus find that the title of a locator to a mining claim is not only property, but it is property which, in addition to being sold, transferred and mortgaged, is also capable of being inherited, without in any manner infringing the title of the United States.

The legislature of Arizona, by a statute which was in force in December, 1899, defined the meaning to be given the term "real property" in the construction of statutes, as coextensive with lands, tenements and hereditaments. This statute is said to have been repealed September 1, 1901, before the execution was issued in this case, and was reënacted March 5, 1907. Session Laws, 1897, chapter 10, page 8, § 5.

That legislature, also, in the title of the Revised Statutes relating to conveyances, provided that "The term 'land,' as used in this title, is declared to mean and include mines and mining claims;" and the statute relating to fraud and fraudulent conveyances (Arizona Statutes, paragraph 2708) reads: "The term real estate, as used in this title, shall be deemed to include mines and mining claims." By paragraph 2948 of the same statutes it is enacted that "The words 'real property,' whenever used in this title, is taken to include mines." The statute relates to the limitation of actions, and provides for the remedies which may be enforced in mining claims.

It is not contended that these special statutes, except the first, thus referred to, relate to or affect judgment liens on mining property as real property, but they show the general intent of the legislature to include claims of such a nature in

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speaking of real estate or real property. But the statute defining the meaning of the term "real property," was in force when the Wager judgment was obtained, and the statute made property that might be inherited, real property, upon which a judgment would be a lien. Taking the decisions of the courts, some of which are above referred to, and considering the general nature and meaning of the legislation of the Territory, we conclude that the words "real property" covered mining claims. The lien of the judgment therefore existed when the conveyance by Wager was made in August, 1900, and that conveyance would be subject to that lien.

Of course, if the conditions subsequent, as the doing of the necessary work, were not performed, the title would be subject to forfeiture.

The case of *Black* v. *Elkhorn*, 163 U. S. 445, has been referred to as in some way inconsistent with the decision of the court below in this case. All that was there decided was that the plaintiff, widow of the locator, was not entitled to dower under the statutes of Montana on that subject with reference to a mining claim under the statutes of the United States.

This court held that under the Federal statute no right was granted to the wife of a locator, either present or contingent, and that the Government, being the owner of the land, could impose its own terms upon which to grant any right, whether of possession or of purchase. The character of the interest of a locator in a mining claim, as held in the cases above cited, was referred to and was not questioned. The case turned upon the peculiar nature of the widow's claim for dower in such a case and that such interest did not attach to mining claims. That as the Government still retained the title, the locator did not take such an estate in the claim that dower attached to it.

The judgment under which the appellee claims having become a lien under the Arizona statute upon being docketed in December, 1899, the subsequent conveyance of the interest of the judgment debtor to a third party did not clear the prop-

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erty from the lien of the judgment, but the same was in force at the time of the issuing of the execution upon it and of the sale under such execution.

The judgment of the Supreme Court of Arizona was right, and is

Affirmed.

HARTEN v. LÖFFLER.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 91. Argued January 26, 1909.—Decided February 23, 1909.

In an action by the vendee for damages, although the amount recovered is less than $5,000, if the vendor not only disputes the judgment but claims more than $5,000 as balance of purchase money this court has jurisdiction to review the judgment of the Court of Appeals of the District of Columbia.

Where its meaning is not clear, a contract is to be construed in the light of circumstances surrounding the parties when the contract was made and a practical interpretation given thereto. *Lowber* v. *Bangs*, 2 Wall. 728.

"About" is a relative, and frequently ambiguous, term, the precise meaning of which is affected by circumstances; and oral evidence is not inconsistent with, or contradictory of, a written contract which simply identifies property as shown on a diagram annexed thereto, and is admissible to show the intent of the parties in the light of the surrounding circumstances.

Where the vendee sues for breach of a contract to sell real estate and the benefit of the business and goodwill as well, the measure of damages is the differences between the purchase price and the market value at the time of the contract and evidence as to the value of each item is admissible.

A hypothetical question of value of property is not admissible when there is no evidence to support the hypothesis on which it is based.

29 App. D. C. 490, affirmed.

THE defendant in error, hereafter called the plaintiff, commenced this action against the plaintiff in error, hereafter called the defendant, in the Supreme Court of the District of

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Columbia to recover damages for the refusal of the defendant to perform a written agreement made between the plaintiff and the defendant and his wife, by which the defendant agreed to convey certain premises on Brightwood avenue, or Seventh street, in the District of Columbia, to the plaintiff for the sum of $12,000.

The defendant denied the alleged agreement, and also pleaded a set-off to recover $20,000 damages against the plaintiff for the plaintiff's own failure to perform the agreement set up by defendant.

The plaintiff replied, denying the defendant's averments as to set-off, and the latter joined issue on plaintiff's replication.

A trial was had before a jury and terminated in a verdict for the plaintiff for $1,250, with interest on $250 from April 27, 1905, upon which judgment was entered.

Upon appeal to the Court of Appeals of the District, that court affirmed the judgment (29 App. D. C. 490), and the defendant sued out a writ of error from this court.

The material facts in the case are as follows:

The defendant, on the twenty-seventh of April, 1905, was the owner of a lot or parcel of land on Brightwood avenue, or Seventh street, a half mile north of Brightwood in the District of Columbia. On the date named the parties entered into an agreement, and the defendant and his wife signed the same, as follows:

"For and in consideration of the sum of twelve thousand dollars, two hundred and fifty dollars whereof is hereby acknowledged, I hereby agree to sell to Ernest Löffler the property, good will, license and fixtures, located on Brightwood avenue near Battle Ground Cemetery, fronting on Brightwood avenue about sixty feet, with a depth of about two hundred feet, title and transfer of license guaranteed or deposit refunded. I agree to use my best efforts to secure the signers for the transfer of said license and to give said Löffler a clear title to all of above property."

To understand more readily the applicability of the evidence

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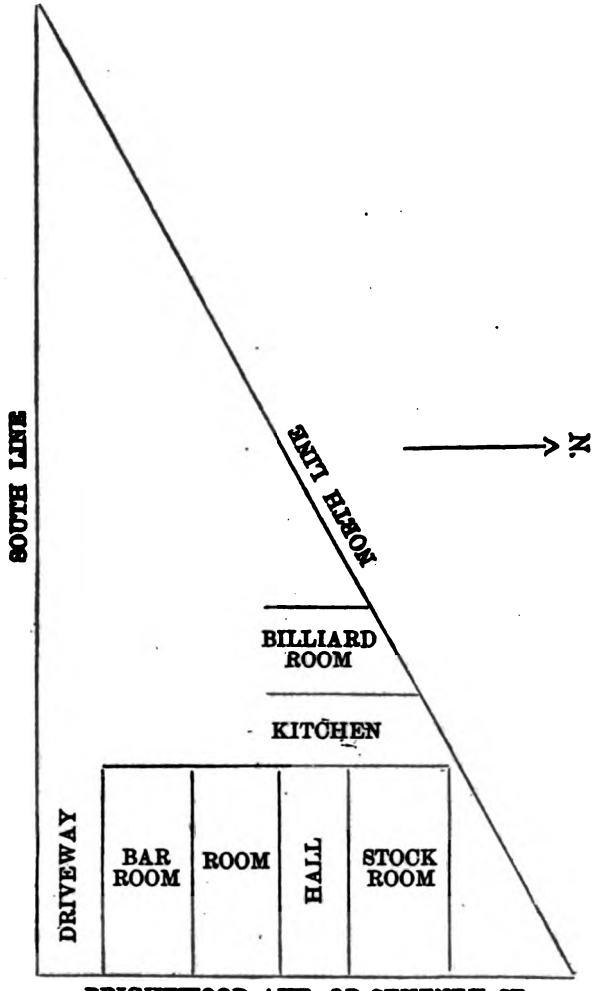
a diagram showing the shape of the lot and the location of the buildings is given below.



The principal questions on the trial arose in regard to the admission and exclusion of certain evidence by parol and upon exceptions taken to the charge.

The opinion of the Court of Appeals was delivered by the

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late Mr. Justice McComas, who made a synopsis of the facts and evidence, which is herewith inserted:

"The defendant owned a parcel of land on Brightwood avenue, or Seventh street road, a half mile north of Brightwood in this District. He there kept a saloon and country tavern in a building erected on a lot triangular in shape, fronting eighty-five feet on Seventh street road. As appears in the diagram the front line and the south line of the triangle formed a rectangle, and the south line was two hundred and twenty-four feet long. The hypothenuse, or north line, was two hundred and thirty-nine and a half feet long. The improvements fronted on the Seventh street road and comprised a frame building standing fifty-one and a half feet along the road. At the northeast corner was a small lot of ground with a front of thirteen and a half feet, the house line running back at right angles nearly joined the north line, making this lot a triangle. On the south side was a driveway about twenty feet wide. At the south end of the building was a bar-room and adjoining it on the north was a serving room for guests. A hallway came next on the north and on the north side of the hall was a store room for liquors, above which on the second story was a ball room. The remaining upper rooms of the house were used as living rooms for the family of the defendant. Back of the store room on the ground floor on the north line of the premises was a kitchen, and in the rear of that on the same north line was a billiard room for guests. In the rear of these structures, and all adjoining the north line, were various stables, sheds, and out-houses.

"Beginning at the south line of this parcel of land, if one measured sixty feet northward on the front line, the end of the sixty foot line was at a point in the hall doorway near the middle thereof, and only the south forty feet of the building would be included within the sixty feet while eleven and a half feet of the north end of the building and a small triangular lot before described would be excluded. All the premises were occupied and used in their entirety by the defendant.

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"From the record, it appears the defendant told Charles D. Hood, a liquor dealer, that he wished to sell his property and business for twelve thousand dollars; that he wished to get out of the neighborhood because he could not do business there and the protests made it difficult to renew his license. Hood communicated this information to the plaintiff, who sent his agent to purchase the property. This man introduced himself as a real estate agent to the defendant and asked him what he wanted for the place, and the defendant said he would take twelve thousand dollars for the property, fixtures, and everything excepting pool tables and stock. Later this agent called with the plaintiff, who came as a prospective purchaser, and the defendant with knowledge of that conducted the plaintiff over the premises, showing him over the whole building, upstairs and downstairs and into the kitchen and billiard room.

"Several days later, on April 27, 1905, after the plaintiff had sold his saloon in Georgetown, he notified the defendant that he would visit him to 'make the deal,' and the two parties and this agent met on the premises the same afternoon. The price asked by the defendant was finally agreed to and it was agreed that Mr. Richard, a wholesale liquor dealer, a friend of both parties, who had helped the plaintiff to sell his saloon and had driven out with him, should write the agreement.

"During these negotiations, the defendant did not suggest that he did not intend to sell the whole premises or that he intended to reserve any portion, but said that the stock of liquors and the pool or billiard tables were not included in the sale. Richard wrote the following paper, which was signed by the defendant and his wife.

[It is the agreement above set forth.]

"Richard testified when he had written as far as 'license—fixtures located on Brightwood avenue near Battle Ground Cemetery' he turned and asked, 'what is the size of this place,' and there followed a discussion between the two Löfflers, Harten and himself. One of the party suggested it was about sixty feet and Harten said 'that is about right,' and Richard so wrote

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it. Nothing was said by Harten or by Löffler to indicate that only a portion of the premises was to be sold and it was understood that the whole of the premises was covered by the description.

"The plaintiff testified that in this discussion the defendant stated that the lot had about sixty feet front and about two hundred feet in depth; that when Richard was writing the contract 'he asked Mr. Harten how much ground was in this place. We all were guessing and Mr. Harten said put it down about sixty feet front, and about two hundred feet deep, and Mr. Richard said all right, we put it down that way.' That when the paper had been prepared, Harten called to Mrs. Harten and said to her 'I want you to sign this contract, I sold the place.' Before the contract was prepared, and while they were discussing the price, the defendant said to the plaintiff 'I will sell everything here.'

"Andrew Löffler, the agent, testified that when we came down to describe the place, Harten told him it was described in the license. Harten brought the license. The description in the license is opposite 'Battle Ground Cemetery.' Richard put that down and said we should describe the property a little plainer; he said, 'what is the square number or what is the number of the lot;' Harten said, 'there is no number to the lot;' he did not know the number of the square, so he said, 'we had better put down the number of feet you have here.' Somebody asked me what my idea was, and I said about sixty feet; I looked out of the window to size it up; Mr. Löffler made a guess, and we all made a guess. Harten said put it down about sixty feet; we estimated about sixty feet front and about two hundred feet deep.

"Peter J. May testified that he met the plaintiff and his wife at Harten's place on the day after the sale and Harten stated that Löffler had bought him out, that he had sold the whole place, everything, ground and all, and was going out of business, and this witness and Mrs. Löffler were shown through the house by Harten who then described how she was going to fix up the

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house, and Harten conducted them into many rooms, including the liquor store room and the ball room above it. Later, the plaintiff asked the defendant to indorse the license paper and sign the application for its transfer. The plaintiff or his agent or attorney frequently repeated this request. Harten always refused to sign, at one time saying he did not want family trouble. Finally, when urged by the plaintiff and his attorney and being charged with attempting to back out of his agreement, the defendant replied 'I won't sign a damn thing.'

"Subsequently the plaintiff tendered to the defendant the purchase money and a deed of the premises, and without reading it the defendant refused to sign, and immediately after offered to the agent, Löffler, a hundred dollars 'to get me out of this.' "

Mr. Lorenzo A. Bailey for plaintiff in error.

Mr. Leon Tobriner, for defendant in error, submitted.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The defendant in error objects that this court is without jurisdiction on the ground of the amount in controversy not being sufficient. Taking the pleadings, the evidence given, and the verdict of the jury, it would seem that the amount in dispute is sufficient to give this court jurisdiction. In his set-off the defendant claims the unpaid balance of the purchase price for the property agreed upon, which unpaid balance amounted to $11,750, and he claims that sum now, and he also claims that the amount of the judgment against him of $1,250 is erroneous, and that a reversal of this judgment will permit him to claim before a jury on another trial the full amount of his set-off, or at least the balance due for the purchase price. We think the court has jurisdiction. *Block* v. *Darling*, 140 U. S. 234; *Buckstaff* v. *Russell & Co.*, 151 U. S. 626.

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The objection made by the defendant to the oral evidence goes to its being contradictory to or inconsistent with the written agreement. The defendant maintains that the admission of such evidence was contrary to the rule on that subject. We agree with the Court of Appeals that the evidence was properly admitted. The tendency and purpose of the whole evidence were simply to show the circumstances existing at the time when the contract in question was executed, and to identify the premises, and to give point and meaning to the word "about" as contained in the contract. "About" is a relative and frequently ambiguous term, and its precise meaning is affected by circumstances existing when the word is used in a contract, and known to and recognized by the parties. The evidence was not inconsistent with, nor did it contradict, the written contract, but when a diagram of the premises is shown it plainly appears that the word "about," with reference to the width of the premises on Brightwood avenue, left an ambiguity in the contract which it was perfectly proper to explain by oral evidence. The oral evidence identified the premises and gave point and certainty to the meaning of the word. In *Lowber* v. *Bangs*, 2 Wall. 728, 737, it was said that contracts where their meaning is not clear are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they by their conduct have given to the provisions in controversy. Taking these existing circumstances and that interpretation into consideration, it is seen that the identification of the premises is made clear by the oral evidence, and it is also plain that the word "about" must extend the sixty-feet limit to the north end of the premises. It never could have been the idea of either party that the building should be cut in two, and certainly no language was used which set forth such unusual meaning. Cases are almost innumerable upon the subject of oral evidence in connection with written instruments, but we are satisfied the rule was not infringed by the introduction of such evidence in this case. The opinion of the Court of Ap-

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peals is satisfactory and nothing more need be added upon the subject.

Fault is found with the admission of evidence in regard to the measure of damages. The rule was correctly stated by the trial court to be the difference between the purchase price and the market value at the time of the contract of sale. In the opinion of the Court of Appeals it was stated that as the contract of purchase intended not only the real estate, but also the benefit of the license, the business and the good will, it was proper to give evidence of the value of each of them, and this was the purpose of certain evidence, which was properly admitted.

The exclusion of the evidence of the witness Montague when called by the defendant with reference to the value of the property was not error, because there was absolutely no evidence whatever to support the hypothesis stated in the question. The question assumed as a fact that the business amounted to $150 or $200 a week, and that the realty was worth only $4,000 with the improvements, the land and buildings on it, and then the question was put, "What would be a fair price to pay for that land with the improvements and fixtures, and the liquor license and good will of the business, but not including any of the stock in trade?" The question assumed the value of the greater portion of the property sold.

We have carefully looked through the record and find that the other exceptions taken by the plaintiff in error upon the trial are plainly unimportant and immaterial.

The judgment must be

Affirmed.

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NORTH SHORE BOOM AND DRIVING COMPANY *v.* NICOMEN BOOM COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 107. Argued January 29, February 1, 1909.—Decided February 23, 1909.

A State, in the absence of any statute by Congress, has plenary power in regard to navigable streams wholly within its boundaries; and obstructions in such streams, in the absence of statute, constitute no offense against the United States, and whether obstructions are unlawful under state law is not a Federal question. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1.

Where a Federal law is applicable requiring consent of the Federal Government there is concurrent or joint jurisdiction of the state and National governments over the erection of structures obstructing navigation of a navigable stream wholly within a State. *Cummings* v. *Chicago*, 188 U. S. 410; *Montgomery* v. *Portland*, 190 U. S. 89.

Section 10 of the River and Harbor Act of March 3, 1899, c. 425, 30 Stat. 1151, alters § 7 of the River and Harbor Act of September 19, 1890, c. 907, 26 Stat. 454, and prohibits obstructions in navigable waters of the United States not affirmatively authorized by Congress, and whether the State has assented to such obstructions remains with the State alone and is not a Federal question reviewable by this court under § 709, Rev. Stat.

Writ of error to review 40 Washington, 315, dismissed.

THE Nicomen Boom Company, hereinafter called the plaintiff, commenced an action against the North Shore Boom and Driving Company, hereinafter called the defendant, in the Superior Court of the State of Washington, Pacific County, to enjoin the defendant from building a boom in the North River, (a river wholly within the boundary of the State of Washington), within the locality designated in the plaintiff's plat and survey for its boom.

The action was founded upon the allegations that the plaintiff was the first to file its plat, and that it commenced to build its boom under the statutes of the State of Washington, and

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that the defendant was threatening to build its boom within the locality marked out and designated by the plaintiff in its plat or survey filed with the Secretary of State, although its boom had not actually been completed the whole distance indicated in such plat or survey.

The defendant denied the various allegations of the plaintiff and the parties went to trial, which resulted in a judgment for the defendant, dismissing the plaintiff's complaint. The plaintiff appealed to the Supreme Court of the State, where the judgment was reversed and the cause remanded to the Superior Court, with directions to enter judgment enjoining the defendant from building the boom within the location marked on the plat or survey for the plaintiff's boom. See the opinion of the state court, 40 Washington, 315, showing plainly and in full the grounds of the decision.

The defendant has sued out a writ of error from this court and brings the judgment here for review.

Mr. Charles E. Miller and *Mr. John M. Thurston*, with whom *Mr. W. H. Abel*, *Mr. James B. Howe* and *Mr. Samuel H. Piles* were on the brief, for plaintiff in error:

Both boom companies were incorporated long after the passage of the act of Congress of September 19, 1890, and both recognized the authority of Congress by securing permission from the Secretary of War to erect their respective boom structures. If either company had attempted to erect its boom without the Federal assent, it would have been very promptly stopped and ejected from the river by the Secretary of War. Hence, the authority of any person to thus occupy this stream is wholly a Federal question, whether the right questioned is under the Federal or state statutes. *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 218; *Cummings* v. *Chicago*, 188 U. S. 410.

The erection of a structure in a navigable river, within the limits of a State, depends upon the concurrent or joint assent of both the National Government and the state government.

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The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. *Cummings* v. *Chicago*, 188 U. S. 410; *Montgomery* v. *Portland*, 190 U. S. 89.

As the authority over the navigable waters of the United States is paramount in Congress and any voice in their control by the States is only by the grace of Congress, which may be withdrawn at any time, as to what constitutes the assent of a State, to be concurrent with National assent, is, *ipso facto*, a Federal question.

The Washington Supreme Court held that the filing of a boom plat was analogous to the filing of a plat for right of way by a railroad corporation which would hold the location until actual abandonment and that therefore the defendant in error had the state assent and that plaintiff in error did not have such assent. This was the sole question in the case and from its very nature could only be a Federal question. *Blythe* v. *Hinckley*, 180 U. S. 333; *Am. Sugar R. Co.* v. *Louisiana*, 179 U. S. 89; *Douglass* v. *Wallace*, 161 U. S. 346.

It must appear from the record that the question was necessarily involved in the decision; and that the state court could not have given the judgment or decree, which it has passed without deciding it. *Armstrong* v. *Athens Co.*, 16 Pet. 281.

This case is cited in many cases, notably the following: *Moore* v. *Mississippi*, 21 Wall. 638; *Murray* v. *Charleston*, 96 U. S. 442; *Crossley* v. *New Orleans*, 108 U. S. 105; *Weatherby* v. *Bowie*, 131 U. S. ccxv; *Kaukauna Water Power Co.* v. *Green Bay & M. C. Co.*, 142 U. S. 69; *Gulf Etc. R. R.* v. *Hewes*, 183 U. S. 66; *Anderson* v. *Carkins*, 135 U. S. 483; *Powell* v. *Brunswick Co.*, 150 U. S. 433.

It is not necessary that the treaty or act of Congress on which the Federal right is based should have been pleaded specially or spread upon the record. It is sufficient if the record shows that it must have been construed. *McCullough* v. *Virginia*, 172 U. S. 118, and see also *Wedding* v. *Meyler*,

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192 U. S. 573; *Covington* v. *Sanford*, 164 U. S. 595; *Mitchell* v. *Clark*, 110 U. S. 645; *Boyd* v. *Nebraska*, 143 U. S. 180; *Des Moines* v. *Iowa H. Co.*, 123 U. S. 555; *Erie R. Co.* v. *Purdy*, 185 U. S. 148; *Snell* v. *Chicago*, 152 U. S. 191; *Muter* v. *Montgomery*, 156 U. S. 385; *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 295; *Cook Co.* v. *Calumet Dock Co.*, 138 U. S. 365; *C., B. & Q. R.* v. *Chicago*, 166 U. S. 228.

Mr. James G. Wilson, with whom *Mr. W. W. Cotton* was on the brief, for defendant in error:

A writ of error from the Supreme Court of the United States to the Supreme Court of a State, can be sustained only when the decision is against the right specially set up or claimed under the Constitution and laws of the United States, and if the decision of the state court rests upon independent grounds of law, sufficient to sustain it, but not involving a Federal question, the Supreme Court of the United States has no jurisdiction and will dismiss the writ of error, and this, even in a case where a Federal question is also decided. Taylor on Jur. and Pro. of U. S. Supreme Court, §§ 238–240; *Rutland R. R. Co.* v. *Central of Vermont R. R. Co.*, 159 U. S. 638; *Eustis* v. *Bolles*, 150 U. S. 366; *Cal. Powder Co.* v. *Davis*, 151 U. S. 393; *Giles* v. *Teasley*, 193 U. S. 169; *Sawyer* v. *Piper*, 189 U. S. 156; *Harrison* v. *Morton*, 171 U. S. 46; *Allen* v. *Arguimbau*, 198 U. S. 154; *Chapin* v. *Fye*, 179 U. S. 128; *Corkran Oil Co.* v. *Arnaudet*, 199 U. S. 193; *Fullerton* v. *Texas*, 196 U. S. 192; *Capital Bank* v. *Cadiz Bank*, 172 U. S. 425; *Dower* v. *Richards*, 151 U. S. 666; *Egan* v. *Hart*, 165 U. S. 188; *McMillan* v. *Ferrum Min. Co.*, 197 U. S. 343.

The mere fact that the controversy arose out of a location in a navigable water in the United States, or under a statute of Congress, would not necessarily raise a Federal question within § 709 of the Revised Statutes. *Egan* v. *Hart*, 165 U. S. 188; *McMillan* v. *Ferrum Min. Co.*, 197 U. S. 347; *Telluride P. T. Co.* v. *Rio Grande W. R. Co.*, 175 U. S. 643.

The effect of § 10 of the River and Harbor Act is to make

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the erection of a structure in a navigable river within the limits of a State dependent upon the concurrent or joint assent of both the National Government and the state government. The question of whether or not the assent of the National Government had been acquired might raise a Federal question and authorize a writ of error, but the question of whether or not the assent of the State had been obtained, is purely a matter of local and state law and does not involve a Federal question. *Cummings* v. *Chicago*, 188 U. S. 431; *Montgomery* v. *Portland*, 190 U. S. 103.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

This is a contest between two boom companies incorporated under the laws of the State of Washington, authorizing the organization of corporations of this kind.

In April, 1900, the plaintiff, after its organization, filed in the office of the Secretary of State of Washington its plat or survey, showing so much of the shore lines and waters of the North River and lands contiguous thereto as it proposed to appropriate under the laws of the State. Before beginning its boom it submitted to the Secretary of War of the United States the plan of its proposed improvement and a plat of the territory to be occupied thereby, and was granted permission by the War Department to construct a boom within the limits of the river covered by the plat. The plaintiff proceeded to erect its boom along the left side of the river, but stopped short of the upper end of the territory covered by its plat of location. The boom was substantially constructed at a cost of about $16,000, and has been operated from the time of its erection as originally constructed; and plaintiff has always expected to extend the boom within the limits of the plat of location as the demands of business might require. Some days before the commencement of the actual work of extending the plaintiff's boom the defendant commenced to construct its boom within the limits of the original plat of the plaintiff.

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The defendant was organised in 1903 and filed its plat and survey in the office of the Secretary of State of the State of Washington, and it alleges that before commencing to construct its boom it secured from the War Department of the United States permission to construct the boom within its location. The boom of the defendant, if constructed according to its plans, would cause logs coming down the river intended to reach the plaintiff's boom to enter the main boom of the defendant. The booms, as proposed by the plaintiff and defendant, cannot both be constructed. If the boom of the plaintiff should be extended up the river within the limits of its plat and survey, the passage between its line of dolphins and the dolphins of the defendant on the other side of the stream would be so narrow as to block navigation. Moreover, it would be impracticable to operate both booms under such circumstances. If the defendant is permitted to operate its boom as intended, the boom of the plaintiff will receive only such timber from up the river as may escape from the boom of the defendant and such as may be transmitted through that boom to the plaintiff. These facts are practically undisputed and are found in the record and findings of the court.

The Federal Government has taken no part in the dispute between the two corporations. The laws of the State provide for proceedings to build booms and the defendant contends that it complied with those statutes, and had also obtained from the chief clerk of the War Department a written statement, dated March 23, 1903, stating that the War Department would not interpose any objection to the construction and maintenance of the boom in the manner proposed by the defendant, so long as it did not unreasonably interfere with navigation.

Several laws have been passed by Congress, contained in the River and Harbor Appropriation Acts, prohibiting obstructions in the waters of the United States, and also providing for getting the consent of the Government, through the Secretary of War, to the building of booms, bridges, etc. See

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act of 1890, 26 Stat. 454, chapter 907, §§ 7, 10. Also act of March 3, 1899, 30 Stat. 1151, chapter 425, § 10.

The state court did not find it necessary to decide the question whether the defendant had complied with the Federal statute in regard to the building of its boom, but held that it had not complied with the statutes of the State of Washington in regard to the building of such proposed boom, and it therefore had no right to build it, and it enjoined the defendant from so doing, and directed judgment to be entered to that effect.

Before discussing the merits of the case the defendant in error made a motion to dismiss the writ of error for the want of jurisdiction, there being, as it asserts, no Federal question reviewable under § 709 of the Revised Statutes.

The river in question is a navigable stream, entirely within the State of Washington, and, in the absence of any statute by Congress, a State has plenary power in regard to such waters. Obstructions in those waters may be offenses against the laws of the State, but constitute no offense against the United States in the absence of a statute. *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S. 1. The question whether the acts complained of, such as obstructions, etc., in the river, are lawful or unlawful under the state law, is, as was said in the above cited case (page 9), a state question, not a Federal one. Where there is a Federal law which it is claimed also applies to the subject and requires the consent of the Federal Government, then there is a concurrent or joint jurisdiction of the state and National governments over the erection of a structure which obstructs navigation. *Cummings* v. *Chicago*, 188 U. S. 410; *Montgomery* v. *Portland*, 190 U. S. 89.

It is contended, however, on the part of the counsel for the defendant that whether the assent of the State has been given to the erection of the structure is in and of itself a Federal question, and he cites *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 218, as authority for the proposition. That case was commenced in the Circuit Court of the United States for the State of Washington, Northern Division, and was

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brought by the United States under the direction of the Attorney General, pursuant to the provisions of § 10 of the River and Harbor Bill of 1890, 26 Stat. *supra*. It was brought to enforce the right of the Government to prevent the erection of a structure that obstructed the navigation of the river. It was held in that case that the words in the tenth section, "not affirmatively authorized by law," referred to the state as well as to the Federal law, and that the question then arose as to whether the structure was permitted by that [state] law, and as the law of Congress provided that it might be permitted if affirmatively authorized by a state law, the question whether it was so authorized became in effect a question whether the Federal law did or did not permit it. If it were authorized by the state law, then the Federal law provided that it might continue; and whether it was or not, became a Federal question.

This is not such a case, and it is not brought by the Government under the section above mentioned, but the suit concerns private parties only, and the statute does not, in the section applicable, refer to any state law as in the case cited. Section 7, River and Harbor Act of 1890, 26 Stat. 454, chapter 907. And § 10 of chapter 425 of the Laws of 1899, 30 Stat. 1551, *supra*, alters the tenth section of the statute of 1890 by providing: "That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited." It leaves out the words "not affirmatively authorized by law," and substitutes "not affirmatively authorized by Congress." There is, therefore, no reference to state action or state law. Obstruction not affirmatively authorized by Congress is prohibited, but the case of the state assent remains with the State for its sole adjudication.

The construction of the boom of defendant in this case, the state court has decided, was not authorized by the State. Whether it was or not, is not a Federal question. The writ of error is therefore

Dismissed.

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RAILROAD COMMISSION OF LOUISIANA *v.* CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 182. Argued October 20, 21, 1908.—Decided February 23, 1909.

Where diverse citizenship exists complainant may assert in a suit in the Circuit Court of the United States that rates fixed by ordinance are so low as to be confiscatory under the Fourteenth Amendment or unreasonable or unjust under the provisions of state law. Rates fixed by the body having jurisdiction, after investigation based on reports of the corporation rendering the service, are *prima facie* fair and valid and the burden of proof is on the complainant attacking them to show that they are confiscatory or unreasonable.

Where a public service corporation raises more money in a particular year than required for actual depreciation it cannot carry the excess to capital for the purpose of estimating the amount on which it is entitled to pay dividends in determining whether a rate is unconstitutional as confiscatory, and the onus of showing that this has not been done is on complainant where the books show that such an excess has been collected.

Quære, and not decided, whether it would be entitled to dividends on such excess if invested in extensions and additions.

While in some businesses where increased demand does not involve a corresponding increase in expense, increased profits may result from decreased rates, this rule does not apply to a business, such as that of a telephone company, where expenses are proportionately increased with increased demand and service.

Although complainant failed to prove its case, the bill will not be dismissed but a new trial ordered, as the rates have been in force and the inquiry can be founded upon their actual effect.

156 Fed. Rep. 823, reversed.

THIS case comes here upon appeal by the railroad commission, which was defendant below, from a decree of the Circuit Court of the United States for the Eastern District of Louisiana, enjoining the enforcement of certain rates prescribed by the

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railroad commission of that State, for use by the appellee telephone company therein. The appellant was created under art. 283 of the constitution of the State of Louisiana; and art. 284 of that constitution authorizes it to adopt just and reasonable rates, charges and regulations governing and regulating, among other corporations, those operating the telephone within the State. The commission has the power to examine and compel the attendance of and to swear witnesses, and compel the production of books and papers, to take testimony under commission and to punish for contempt, as fully as provided by law for the District Courts.

Article 285 of the constitution provides that if any corporation subject to the commission is dissatisfied with its decision "fixing or adopting any rate, . . . the corporation thus dissatisfied may file a petition, setting forth the cause of its objection, in a court of competent jurisdiction at the domicil of the commission, against said commission as defendant, and either party to such action may appeal the case to the Supreme Court of the State without regard to the amount involved, . . ."

By art. 286 it is provided, among other things, that "whenever any rate, order, charge, rule or regulation of the commission is contested in court, as provided for in art. 285 of this constitution, no fine or penalty for disobedience thereto, or disregard thereof, shall be incurred until after said contestation shall have been finally decided by the courts, and then only for acts subsequently committed."

Under these provisions of the constitution the railroad commission had been created and was in operation, and on or about August 6, 1906, it established and promulgated certain rates for the complainant to charge for its services within the State of Louisiana, to take effect September 1, 1906. The complainant, immediately after the promulgation of the order and before the time when it was to take effect, applied to the commission for a rehearing before it, which was granted, but no evidence was taken on such rehearing, and the commission subsequently

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reaffirmed the order and directed that it should take effect on the twentieth of October, 1906. Thereupon the complainant commenced this suit for the purpose of enjoining the enforcement of the rates established by the order, which is designated as Order No. 552.

In the bill filed by the complainant it was alleged that the complainant was a corporation organized and existing under the laws of the State of Kentucky and a citizen and resident of that State, and that the railroad commission of Louisiana was a corporation organized and existing under the laws of the State of Louisiana and was a resident of that State and of the district in which suit was brought, viz., in the Eastern District of Louisiana, Baton Rouge Division.

It was also alleged that prior to August 6, 1906, the complainant had in force and effect a tariff of rates between points in the State of Louisiana, which had been promulgated and put into effect by the railroad commission of that State; that such rates were entirely fair and reasonable in so far as the public is or was concerned, as under them subscribers were and are able to use said service at a price which did not and does not afford complainant a fair, just and reasonable compensation for its services.

It was also averred that while such rates were in force the commission, without making any investigation and without any evidence in regard to any of the facts necessary to reach a determination, and without any effort to obtain evidence in that direction, made and promulgated, on the sixth of August, 1906, the order known as Order No. 552, by which order it greatly reduced the rates in existence up to that time, and the former rates were thereby changed to the rates specified in the order, which order was to become effective after the first of September, 1906.

The complainant further averred that it had asked for a rehearing, which the commission granted, and thereafter, being still without evidence or investigation justifying the same, the commission reaffirmed the Order No. 552, and declared that

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the same should become effective within ten days from the date of the second order, which was dated October 10, 1906.

It was also further averred that the rates which preceded the rates provided for in Order No. 552 were reasonable, just and fair to the public and not in any wise excessive, and under them complainant received for its services only a fair and reasonable return for the services rendered; that under the tariff of rates promulgated and sought to be enforced by the commission under Order No. 552 complainant would be required to render the services therein described at an unreasonable, unjust and unremunerative rate, which would not afford to it a reasonable return for the services rendered, and that it would thereby be deprived of its property without due process of law; that said proposed tariff was unjust, unreasonable in itself, and was not justified by any conditions, either concerning the services in question or by the financial or physical condition of complainant's property or affairs; that the orders of the commission complained of were unjust, unfair and unreasonable and unwarranted, not only with regard to the tariff as a whole, but with regard to each particular rate charged by said tariff; and that the tariff of rates, as a whole and in detail, constituted, for the reasons already set forth, a taking of complainant's property without due process of law and without compensation being previously made, contrary to and in violation of § 1, Art. XIV, of the Amendments of the Constitution of the United States and in violation of certain (named) articles of the constitution of the State of Louisiana of the year 1898.

For answer the defendant denied that there was no inquiry or proper investigation of the subject-matter prior to the promulgation of Order No. 552 of the date of October 10, 1906; it also denied that the rates established were unjust, unreasonable or improper, or that they would result in the taking of complainant's property without due process of law. Testimony was taken by depositions and upon the trial the court directed a final decree enjoining the commission from putting the rates in force as provided for in Order No. 552, and restraining the com-

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mission from instituting any suit against the complainant for the recovery of any penalty by reason of complainant's failure to put into effect the rates in the order of the commission; and it was further adjudged that the tariff of rates specified in the order should be cancelled and declared to be null and void and of no effect. An injunction was issued pursuant to the decree. See opinion of Circuit Court, 156 Fed. Rep. 823.

Mr. E. Howard McCaleb, Jr., with whom *Mr. Walter Guion*, Attorney General of the State of Louisiana, was on the brief, for appellant.

Mr. William L. Granbery for appellee.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The complainant herein is a citizen of the State of Kentucky, while the defendant is a citizen of the State of Louisiana, and a case of diverse citizenship therefore appears on the record. The complainant is transacting its business in several States, in a territory which is said to be four hundred miles wide and one thousand miles long, beginning in Indiana and Illinois and extending through the States of Kentucky, Tennessee, Mississippi and Louisiana to the Gulf of Mexico. Its capital, from the time of its organization, to May, 1898, was $1,695,700. This capital was thereafter increased from time to time until February 1, 1907, from and after which it was $20,174,350, represented by stock issued from time to time, to that amount. This includes the amount invested in Louisiana. The evidence in the case shows that the company's affairs had been economically administered, and that its business had been conducted in the State of Louisiana, ever since its entrance into that State, with great care and economy; that the stock had not been watered; that its capital was contributed in cash and every economy possible had been practiced. Adverse criticism was

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indulged in in the Circuit Court in regard to the price paid by the complainant for the property of the Great Southern Telephone and Telegraph Company, the price being, as alleged, too high, but the evidence is strongly to the contrary. And, again, the business that complainant is carrying on, the evidence shows, is regarded as hazardous by those familiar with its character, and as being still in an experimental stage with regard to the proper methods of operating, and also as to appliances and other things necessary to the conduct of its business. The property is subject to great and rapid deterioration from exposure to the weather and other causes. The profits in this kind of business are shown to be almost universally low. The complainant's charges for rates in Louisiana before the promulgation of the Order No. 552 were also shown to be as low as those of any of the companies in the country, and lower than most of them. Out of more than a dozen companies, which substantially cover the whole country, there is one which declares dividends of 7 per cent, others 6 per cent, 5 per cent, and 4 per cent, and some nothing, and some are bankrupt. The dividends of complainant have not been declared on any artificial capitalization or watered stock. Complainant has declared dividends as the result of its business through all the States, for the last few years, of 7 per cent. While it is contended by the commission that from the returns made by the complainant to it the complainant has realized upon its investment in Louisiana from 10 to 15, and even 20 per cent, yet on the other hand the complainant asserts that the returns on its investment in Louisiana have been less than 6 per cent during most of the time the complainant has been in the State, and ending June 30, 1907. It is asserted that complainant had expended in Louisiana up to June 30, 1906, $4,711,000.00 in the purchase and construction of exchanges and toll lines which amount was still further increased by June 30, 1907, to $5,394,154.43, and it is upon these totals that the percentage of net income to investment is made up.

The president of the company testified that unless things

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changed and it was permitted to charge the rates which had been charged prior to the adoption of these rates which are now in question, it would be unable to continue to pay 7 per cent, and that the company would necessarily retrograde, and that while the company had paid 7 per cent to its stockholders for the past few years, it could not continue so to do if the rates in question were adopted. That it did not, in fact, receive anything like 7 per cent upon its investment in Louisiana, and that the average market for money in that State on good securities, and much more certain than telephone stock, was at least 7 per cent, and that there was no inducement to investors in the State of Louisiana, or in the New Orleans money market, to invest in stock in such a company as that of the complainant, where there was more risk and probably less return than in other investments which could be had in that city and State. This evidence was not, in terms, contradicted, though other contentions are made by the appellants. The differences between the parties as to the rate of the return upon the investment in Louisiana arise from the different data taken by them upon which to calculate the return, and will be referred to later. The single question before us is as to the character of the rates provided in Order No. 552, whether such rates are confiscatory, or, if there is any difference, whether the rates are only unreasonable, unjust and inadequate, although not confiscatory, and therefore not in violation of the Federal Constitution. The question under articles 284 and 285 of the constitution of Louisiana, *supra*, even of the unreasonableness of the rates, may be inquired into by a Federal court, by reason of the diverse citizenship of the parties to this suit, and the complainant is not confined to a state court upon this question. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391. The complainant comes into court on both grounds, asserting that the rates are so low as to take its property in violation of the Fourteenth Amendment to the Federal Constitution, and also that the rates are so low as to be unreasonable and unjust under the above cited articles of the constitution of Louisiana.

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Like any other case, the onus rests upon this complainant to prove the existence of the fact it alleges, viz., that the rates are so low as to be confiscatory, or at least unreasonable and unjust. The court below held that the rates actually established by the commission were void, because, as was stated by the court, those rates were not established upon investigation into the question of their sufficiency, but by a merely arbitrary conjecture by the commission, not based on investigation or the exercise of judgment and discretion, and the order promulgating the establishment of the rates was, therefore, illegal and void, and hence there was no presumption of the correctness of the rates, such as generally obtains in relation to rates adopted by the legislature or a commission appointed by it. See *Chicago, Milwaukee &c. Ry.* v. *Tompkins*, 176 U. S. 167, 173; *Ex parte Young*, 209 U. S. 123, 165.

We are of opinion that the court below erred in its conclusion that there was no presumption in favor of the validity of the rates promulgated by the Order No. 552. We think the evidence shows that these rates were really not adopted by arbitrary conjecture, nor does it show that they were based on no investigation or without the exercise of judgment or discretion.

It seems there had been complaints as to the tariff of rates under which the complainant was operating before the Order No. 552 was made, and the commission had investigated these complaints so far as to make a careful examination of the returns of complainant made to the commission. These returns showed generally the character and operation of the business of complainant, its income, operating expenses and investments in Louisiana. The commission, after examining them, issued the order to show cause why its rates should not be decreased; the commission on the final hearing on the return of the order to show cause took into consideration both the statement presented by the complainant on the return of that order and also the statements or returns previously filed by the company. The secretary to the commission stated that the items in these returns which had most weight in causing the commission to

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reach a conclusion that the rates then charged were unreasonable were the earnings and operating expenses and net earnings, as shown by these reports made to the commission. These reports were annual, and were under oath. It appeared from the evidence of the secretary that he was aware of the fact that the taxing authorities adopted a basis of valuation on telephone property which was not its full market value; that property of this nature, like all other property, was not assessed in Louisiana at its actual value, but for an appreciably less amount, and the valuation as returned to and filed with the commission by the complainant followed the valuation placed upon its property by the taxing authorities, and that the witness therefore knew that the valuation in these reports of the complainant's property in the State of Louisiana was not its real value. He also said that in fixing a schedule of rates the commission did not adopt that valuation as a basis. The witness further stated that the commission, in acting upon the question, was of opinion that the proof showed that the company was making what the commission considered were unreasonable earnings, and that was shown by the annual reports made by it for the years 1904, 1905 and 1906, and the statement filed by the counsel for the company on his return to the order to show cause. No proof was offered to the commission in the presence of any one representing the complainant other than the statement of receipts and disbursements contained in the reports mentioned.

Now it may be true that these returns did not contain all the data upon which a very close and accurate judgment could be based as to the rates that ought to be charged by complainant, under all the circumstances. This is only saying the order may have been erroneous or based upon insufficient evidence, which is no more than saying that upon the investigation the commission may have come to a mistaken conclusion by reason of erroneous inferences from the evidence furnished by complainant's own returns, but that is far from showing that the commission had by a merely arbitrary order promulgated certain rates without making the slightest effort to obtain any

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knowledge whatever upon the subject. It did not lose jurisdiction by reason of the mistakes it may have made, and as a result the rates adopted were not merely arbitrary conjectures, but based on reasons which, while they may have been insufficient, cannot be described as resulting in a decision wholly without evidence to support it. The rates, therefore, promulgated must be regarded as *prima facie* fair and valid, or, in other words, the onus was upon the complainant to show that they were, what it asserts, confiscatory or unreasonable. The court below did state in its opinion that the evidence established that the complainant had not then earned under the tariff in Order No. 488 (which existed prior to No. 552, and the rates under which were higher than those under Order No. 552), as much as 7 per cent on its Louisiana business, and it held that a profit of 7 per cent on the Louisiana business would be only a fair return on a business of this character, and therefore any reduction of existing rates would be unreasonable and unjust. If the conclusion of the insufficiency of the prior rates were justified it would probably be an answer to the claim of the commission that the reduced rates provided for in Order No. 552 were sufficient.

There are one or two facts, however, now to be taken into consideration before the correctness of that conclusion can be affirmed. In the course of the trial various questions were argued as to the manner of conducting such a business as this, with regard to extensions, earnings and disbursements, as well as questions of depreciation of plant and how to treat the amount collected therefor, and other questions of that nature. Exactly how the money which resulted from the rates in actual operation was used was not in all cases shown in detail, either from the books or by oral testimony. Something was left in doubt and to conjecture. In the course of the opinion of the Circuit Court the following was said: "It is urged by the commission that included in the Louisiana investment of complainant is a sum earned from Louisiana business, set aside in the reserve fund and then used in extending the system in

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Louisiana, and now treated as a part of the Louisiana investment by the stockholders. This may be so to some extent—it is certainly possible. But it is impossible for me to determine, from the figures in the record, to what extent, if at all, it is a fact. Counsel for defendant have not themselves undertaken to indicate what, even in round figures, they consider is the sum thus earned in the business and reinvested in the business, without having been distributed to the shareholders in dividends. It will be time to consider the legal results from such a state of facts when it shall have been shown to exist in a definite sum and not in a purely conjectural amount." And again: "Counsel for the commission argued that the complainant's property in Louisiana was not all paid for with complainant's capital, but was partly paid for out of a surplus or reserve, or depreciation fund, which was accumulated by complainant from the receipts of its Louisiana business, and was then reinvested, not in repairs and maintenance, but in extensions and additions to the property. This may be a fact, but it is not shown to be a fact. The commission has power, if it wishes to do so, to direct the books of complainant to be so kept as to show such use of receipts. In the present state of the books this seems to be impossible. And the floating debt of the complainant would seem to be much greater than any sum which could possibly have been used from the reserve, or surplus, or depreciation fund for extensions and additions, after paying for maintenance and repairs."

If the onus rested upon the commission to show these facts it is evident that the obligation has not been fulfilled, but it is just here that the difficulty lies. It was obligatory upon the complainant to show that no part of the money raised to pay for depreciation was added to capital, upon which a return was to be made to stockholders in the way of dividends for the future. It cannot be left to conjecture, but the burden rests with the complainant to show it. It certainly was not proper for the complainant to take the money, or any portion of it, which it received as a result of the rates under which it was

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operating, and so to use it, or any part of it, as to permit the company to add it to its capital account, upon which it was paying dividends to shareholders. If that were allowable, it would be collecting money to pay for depreciation of the property, and, having collected it, to use it in another way, upon which the complainant would obtain a return and distribute it to its stockholders. That it was right to raise more money to pay for depreciation than was actually disbursed for the particular year there can be no doubt, for a reserve is necessary in any business of this kind, and so it might accumulate, but to raise more than money enough for the purpose and place the balance to the credit of capital upon which to pay dividends cannot be proper treatment. The court below said it was impossible to find out from the books how much of this had been done, and it treated the fact as one to be explained by the commission and not by the complainant. In other words, while this fact was a material one the onus was placed upon the commission, and not the complainant, to show it. We think, on the contrary, that the obligation was upon the complainant. Now, although the books, it is said, do not show how much money collected for depreciation has been, in fact, used to increase the capital of the complainant upon which dividends were paid to stockholders, yet still, even if the books do not show accurately, or even at all, what disposition was made of these moneys, at any rate the officers of the complainant must be able to make up some reasonable approximation of the amount, even if it be impossible to state it with entire accuracy, and this duty rests with the complainant, in order that it may discharge the duty devolving upon it to prove that the rates were not unreasonably high under Order No. 488, or, in other words, that they were unreasonably low under Order No. 552. It may be that the sum, if any, thus used was not enough to affect the claim that the rates under discussion were unreasonably low. The evidence is insufficient to show clearly that which complainant is under obligations to show. *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Consolidated Gas Co. of New York*, 212 U. S. 19. W-

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are not considering a case where there are surplus earnings after providing for a depreciation fund, and the surplus is invested in extensions and additions. We can deal with such a case when it arises.

The evidence in this case applied generally to the actual operation of complainant's business under rates in existence prior to those contained in Order No. 552, and higher than those contained in that order, and the evidence, as contended, showed that even under those rates the profits were not unreasonably high. It is not such a case, therefore, as looks only to the possible effects of the future enforcement of the rates claimed to be too low. If higher rates have been in operation, and the result has shown that they were only reasonable and fair rates, it would in such a business as this follow, with considerable certainty, that with lower rates the profits would be decreased and become unreasonably low. We say this because the evidence shows that in the case of telephone companies the general result of a reduction of rates in some other kinds of business does not always follow, namely, that there would be an increased demand, which could be supplied at a proportionately less cost than the original business. Such, it is admitted, would be the case generally in regard to water companies, gas companies, railroad companies, and perhaps some others, where the rate is a reasonable one. For example, it is said that it would cost no more, or certainly scarcely an appreciable amount more, to haul a train of two cars both filled than it would to haul the same train with both cars half filled, and if the reduction in rates should result in filling the cars where previously they had not been half filled, there might be an increased carriage at a cost very little more than before, and probably an increased profit. So, in the case of a water company, the reduced rate might result in furnishing more water to consumers already existing, and the increased cost of furnishing the same would be infinitesimal, where there was a supply sufficiently large to fill the demand. So, also, in furnishing gas at reduced rates, the reduction in the rate would very probably result in increased

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consumption, not only in increased demands from more consumers, but also an increased consumption by consumers already existing, and the increased cost of furnishing the gas would be nothing like in proportion to the increase in consumption. In these cases increased profits might be the result of decreased rates. But with telephone companies, as shown by the testimony of the president of the complainant, the reduction in toll rates does not bring an increased demand, except upon the condition of corresponding increase in expenses. As an illustration the witness took a telegraph company which, as he said, "employs one wire and can send several messages at the same time over that one wire; it employs its own operators to send the message, who consult each other's time and convenience in the handling of it, while the telephone company has to employ two wires, the sender of the message is his own operator, and the telephone operator simply fashions up the facilities for him, and the customer sends his own message, and becomes, therefore, his own operator, hence his convenience and time must be consulted; we have to be ready, in other words, with the operators and the appliances to suit the convenience of the customer, whereas in the telegraph business it is just the other way; the customer brings in his message, and when it suits the convenience of the company to employ its operators and its apparatus to send it, they send the message." The witness then gave further illustration in proof of his contention that the reduction of rates in the telephone business does not increase the business without corresponding increase in the expense.

We do not think this case is one where the bill should be dismissed, even without prejudice, for the reasons that we have stated, that the inquiry has been founded upon the actual effect of rates higher than those permitted under Order No. 552, and therefore that it is not merely conjecture as to what the result of such lower rates would be, the tendency of the evidence being to the effect that the higher rates are still reasonable, and that the lower rates would be unreasonably low. But the burden, as

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we have said, rests with the complainant to prove its case, and it has not performed its obligation when this fact as to the disposition of the so-called depreciation fund is left so wholly in doubt. What is the amount reserved for payments for depreciation? What, if any of it, has been carried into capital? How much of the floating debt would carry interest which might be charged as against the amount of the depreciation fund actually used for extensions and additions and charged to capital? All these are questions not answered by the evidence in the case, and which should be made as clear as possible before an attempt ought to be made to answer the question as to rates. The whole case should, therefore, be opened, so that both sides can, on a new trial, bring out all the material facts upon which a decision can finally be based.

We, therefore, reverse the decree and direct a new trial.

Reversed.

MR. JUSTICE WHITE, not having heard the argument, did not take part in the decision of the case.

McDANIEL *v.* TRAYLOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 70. Submitted January 12, 1909.—Decided February 23, 1909.

Where a number of claims are so tied together by combination or conspiracy as to make the relief sought in regard thereto one claim, the aggregate amount of such claims will be the test of jurisdiction of the Circuit Court; but if the plaintiff fails to prove such combination or conspiracy each claim must be regarded as separate, and, as to those which are less than $2,000, the Circuit Court has not jurisdiction.

An attorney must be the agent of all to bind all; and a plaintiff charging a conspiracy between certain claimants and an administrator

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cannot satisfy the burden of proof which is on him to show that all conspired, by showing that the same person was attorney for several of the defendants, as no presumption exists that he was attorney for all from the fact that, as attorney for the administrator, he advised the payment of all the claims.

THE facts are stated in the opinion.

Mr. G. B. Webster and *Mr. J. R. Beasley* for appellants:

The Circuit Court erred in holding that it had no jurisdiction because the complainants failed to prove any joint act of two or more of the defendants tending to procure the fraudulent allowance of their claims.

The gravamen of the charge in the bill was that the defendants conspired with the administrator and thereby procured the allowances which otherwise would not have been made.

The evidence was that the attorney for the administrator advised the latter to allow all the claims while he was, unbeknown to the administrator, acting as attorney for one of the claimants. The present record discloses Williams as the attorney for all of those claimants, including that one which he then secretly represented. These facts justify the conclusion that in procuring the administrator to allow as expenses of administration what were not valid claims of any nature, he was acting for all whose claims were so allowed. If he was, then his act was their joint act because done in their business and for their benefit. *Bethel Church* v. *Carmack*, 2 Md. Ch. 143; *Chambers* v. *Hodges*, 23 Texas, 104; *I. P. & C. R. R.* v. *Tyng*, 63 N. Y. 653; *Griswold* v. *Gebbie*, 126 Pa. St. 353; *Craig* v. *Ward*, 2 Keyes, 287.

The law only requires the highest quality of proof possible. Where the fact to be proved rests in the knowledge of the other party and he stands silent when evidence is given of other facts from which the ultimate fact to be proved may reasonably be inferred, it is to be considered as sufficiently proven. Greenleaf, Evidence (16th ed.), § 79; 1 Starkie, Evidence, 54; *Lehman* v. *Knapp*, 48 La. Ann. 1148; *S. C.*, 20 So. Rep. 674;

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Commonwealth v. *Webster*, 5 Cush. 316; *Heath* v. *Waters*, 40 Michigan, 457; *Conn. M. L. Ins. Co.* v. *Smith*, 117 Missouri, 261; *Mabary* v. *McClurg*, 74 Missouri, 575; *Runkle* v. *Burnham*, 153 U. S. 225; *Choctaw & M. R. Co.* v. *Newton*, 140 Fed. Rep. 238; *Gulf, C. & S. Ry.* v. *Ellis*, 54 Fed. Rep. 481; *Pac. C. S. Co.* v. *Bancroft W. Co.*, 94 Fed. Rep. 180; *Kirby* v. *Talmadge*, 160 U. S. 379.

In a case of this nature the value of the property upon which the invalid lien rests rather than the amount involved in the lien, is the true test of jurisdiction. The judgment allowing these claims is a cloud upon complainants' title. *Smith* v. *Adams*, 130 U. S. 175; *Parker* v. *Morrill*, 106 U. S. 1. Both are followed in *Simon* v. *House*, 46 Fed. Rep. 317.

In a suit to quiet title it is not the value of the defendant's claim that constitutes the amount in controversy; it is the value of the whole of the real estate to which the claim extends. *Woodside* v. *Ciceroni*, 93 Fed. Rep. 1; *Smith* v. *Adams*, *supra*, was also followed in *Cowell* v. *Water Supply Co.*, 121 Fed. Rep. 53.

In the state courts, by the weight of authority, the rule is the same. *Fuller* v. *Grand Rapids*, 40 Michigan, 395; *Scripture* v. *Johnson*, 3 Connecticut, 211; *Simon* v. *Richard*, 42 La. Ann. 842; *Kahn* v. *Kerngold*, 80 Virginia, 342; *Ayers* v. *Blair*, 26 W. Va. 558.

Mr. N. W. Norton and *Mr. R. W. Nichols* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is the second appeal in this case. The first appeal was on a question of jurisdiction, and is reported in 196 U. S. 415. The object of the suit is to set aside and to declare invalid the liens of certain judgments of the Probate Court of St. Francis County, Arkansas, upon certain real estate, and that the defendants be enjoined from enforcing such judgments. The judgments were rendered upon claims against the estate of Hiram Evans, deceased.

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James Evans was appointed administrator of the estate. Among the assets which came to his hands was a drug store, with its stock of goods, fixtures, book accounts and other things, which he sold to John Evans on the first of May, 1891. The latter conducted the business in his own name and incurred obligations to the defendants aggregating $3,000.00, as well as debts and obligations to other persons, but no single one of his debts exceeded $2,000.00. John Evans became insolvent, and on May 27, 1892, transferred to the administrator the drug store and all that remained of the goods, fixtures and book accounts. The bill alleged that the defendants "conspired, colluded and confederated together with John Evans and the administrator to secure the payment of their claims and demands against John Evans out of the estate of Hiram Evans, deceased," and, "so conspiring and confederating," they presented to the Probate Court their several claims and demands, and that the administrator, James Evans, fraudulently and illegally approved them for allowance against the estate of Hiram Evans. And for like purpose, it was alleged, they procured the judgment of the Probate Court, establishing their claims by concealing from the court that they were debts and obligations of John Evans and "cloaking the same under the name of expenses of administration of the said estate, all of which transactions were a part of the same scheme and were participated in by each and all of the said defendants and by said John Evans and James Evans, administrator." It was further alleged that the judgments were wholly the result of the conspiracy and confederation set out and the fraud practiced in pursuance thereof, and are in equity and good conscience void and ineffectual for any purpose whatever, and ought not to be enforced, but that, nevertheless, the same are at law "liens upon the real estate" described in the bill, "and charges against the respective interests of the plaintiffs." There were other allegations showing that plaintiffs could only obtain relief in equity.

The Circuit Court sustained a demurrer to the bill, being of

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opinion that the value of the matter in dispute was not sufficient to give jurisdiction. On appeal to this court, we said, defining the matter in dispute and its value:

"The matter in dispute is whether the lands in which the plaintiffs have a joint undivided interest of one-half can be sold to pay *all* the claims, *in the aggregate*, which the defendants, by *combination and conspiracy*, procured the Probate Court to allow against the estate of Hiram Evans. The essence of the suit is the alleged fraudulent combination and conspiracy to fasten upon that estate a liability for debts of John Evans, which were held by the defendants and which they, acting in combination, procured, in coöperation with James Evans, to be allowed as claims against the estate of Hiram Evans. By reason of that combination, resulting in the allowance of all those claims in the Probate Court, as expenses of administering the estate of Hiram Evans, the defendants have so tied their respective claims together as to make them, so far as the plaintiffs and the relief sought by them are concerned, *one* claim."

And we further said:

"That it was competent for the Circuit Court upon the case made by the bill to deprive the defendants, acting in combination and claiming the benefit of the orders made in the Probate Court allowing their respective claims. That the value of the matter in dispute in the Circuit Court was the aggregate amount of all the claims so allowed against the estate of Hiram Evans."

The decree of the Circuit Court was reversed with directions to set aside the order dismissing the bill and to overrule the demurrer.

Upon the return of the case to the Circuit Court defendants answered, and the court, after hearing evidence, found that there was a "total failure to establish the fact alleged in the bill, that the said defendants or any two or more of them, whose claims in the aggregate exceeded the sum of $2,000, exclusive of interest, conspired and confederated together in procuring

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the allowance of said claims, and therefore the court is without jurisdiction."

On this ruling errors are assigned, and it is contended (1) that an actual conspiracy was not necessary where the action and conduct of the defendants, acting by and through their attorneys with the attorney of the administrator, were such as to procure the fraudulent allowance of the claims; (2) that the true test of jurisdiction in a proceeding of this kind is the value of the property upon which the inequitable liens rest, and not the amount of such liens.

The first proposition was decided adversely to appellants' contention on the former appeal. As we have already seen, it was the fraudulent combination and conspiracy which united the claims and made the aggregate of the claims the matter in dispute. By reason of that combination we decided the claims were "so tied" together as to make them, "so far as the plaintiffs and the relief sought by them are concerned, *one* claim." We further decided, "the validity of all the claims depends upon the same facts. The lien on the lands which is asserted by each defendant has its origin as well in the combination to which all were parties as in the orders of the Probate Court, which, in furtherance of that combination, were procured by their joint action. Those orders were conclusive against the plaintiffs, as to all the claims, if the claims could be allowed at all against the estate of Hiram Evans. A comprehensive decree by which the plaintiff can be protected against those orders will avoid a multiplicity of suits, save great expense and do justice. If the plaintiffs do not prove such a combination and conspiracy, in respect, at least, of so many of the specified claims as in the aggregate will be of the required amount, then their suit must fail for want of jurisdiction in the Circuit Court; for, in the absence of the alleged combination, the claim of each defendant must, according to our decisions, be regarded, for purposes of jurisdiction, as separate from all the others." With this ruling the decision of the Circuit Court was accurately in accord.

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But the finding of the court, that there was no combination between defendants having claims to the jurisdictional amount, is contested. "The specific and material charge is," counsel say, "that there was an agreement or understanding between the defendants on the one hand and the administrator on the other." And it is contended further that parties may "conspire through their attorneys as well as in person." This may be conceded, but the attorney must be the agent of all to bind all, and the testimony does not establish such agency. It shows only that the attorney for one of the claimants was also the attorney for the administrator and advised him to allow all the claims. It is not shown that he was the attorney of any other claimant. It is, however, contended that it must be presumed that he was attorney for all from the fact of his having advised the payment of all, and from the fact that he is the attorney for several of the claimants in this case. The presumption cannot be made. It was easy for appellants to have shown that he was the attorney for the other claimants. He and they were available witnesses, and as the burden was upon appellants to establish the charge of the conspiracy, which was the foundation of the suit, the presumptions are against appellants' contention rather than for it.

Decree affirmed.

GREENAMEYER *v.* COATE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 100. Submitted January 4, 1909.—Decided February 23, 1909.

When the Secretary of the Interior has jurisdiction of a land contest and grants a rehearing he is not, nor is this court, bound by the facts found by his predecessor on the original hearing, *Potter* v. *Hall*, 189 U. S. 292; after such a rehearing and when, as in this case, new testimony is allowed, the decision then made is the ultimate action of the department.

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The holder of a patent obtained by error of law of, or fraud or imposition on, the Land Department, may be declared to hold the same as trustee for another; but the fraud must have been so practiced as to have prevented the unsuccessful party from fully exhibiting his case, and if the case has been fully considered the decision of the proper officers is in the nature of a judicial determination. *Vance* v. *Burbank*, 101 U. S. 514.

18 Oklahoma, 160, affirmed.

APPELLANT and appellee were respectively plaintiff and defendant in the courts below, and we shall so designate them.

Plaintiff brought this suit in the District Court of Kay County, Oklahoma, to be declared the owner of the legal title to lots 1 and 2 and the E. ½ of the N. W. ¼, section 18, township 26 N., R. 2 E., Indian Meridian, and to require a conveyance of the land to him by defendant. A demurrer to the petition was sustained and a judgment entered dismissing the suit, which was affirmed by the Supreme Court of the Territory.

The petition shows the following facts: August 9, 1893, a portion of the Territory, known as the Cherokee Outlet, was opened for settlement. The plaintiff complied with the terms of the proclamation of the President of the United States, and, having served as a soldier during the war of the rebellion for a period of two years, and being otherwise qualified, filed in the United States land office at Perry, Oklahoma, a soldier's declaratory statement for the land. On the eighth of March, 1894, he duly transmitted his declaratory statement into homestead entry No. 5588, for the same premises, moved a house upon and took up his residence upon them, and continuously lived thereon with his family from such time for seven years, cultivated 40 acres thereof, "cropped the same, and grazed 40 acres in addition," and erected improvements of the value of $450. That after such residence and cultivation he made application in due form to make final proof, which offer was rejected.

On November 24, 1893, the defendant made homestead entry No. 4447 upon the land, subject to plaintiff's soldier's

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declaratory statement, and on the fourth of March, 1904, filed a contest affidavit in the land office at Perry, alleging settlement three days prior to such declaratory statement.

The contest came on for hearing before the local land office and that office decided in favor of defendant. This decision was reversed by the Commissioner of the General Land Office, and, on appeal to the Secretary of the Interior, by that officer. Their opinions and judgments are attached to the petition.

A petition for review being filed by defendant, a rehearing was ordered and the matter remanded to the local land office for further hearing upon questions of fact, but the petition for review was denied. The opinion of the Secretary is attached to the petition. The matter was duly heard by the local office, which office recommended adversely to plaintiff. The decision was affirmed by the Commissioner, and the homestead entry of plaintiff "held for cancellation, subject to the right of appeal." An appeal was taken to the Secretary of the Interior on July 3, 1900, and that officer reversed the departmental decision of June 21, 1898, in favor of plaintiff, affirmed the ruling of the local land office against him, and cancelled his entry.

Plaintiff filed a petition for review, which was denied, and the case was finally closed, the entry of defendant "reinstated, and his rights in and to said tracts were held to be both prior and superior to those of this plaintiff."

Defendant submitted his final proofs, and prior to the commencement of the suit obtained a patent conveying to him the tract in question, and holds the legal title thereto.

The petition alleges the superiority of plaintiff's right to defendant's right, and that by a proper application of the law to the facts as proved in said cause and found by the decisions of the land office the claim of the plaintiff "should have been finally held prior and superior to the claim of said defendant, and the patent conveying title to said tract should and would have been made and delivered" to plaintiff. The misapplication of the law, plaintiff alleges, consisted in the dif-

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ferent conclusion drawn from the facts in the decision of July 3, 1900, in which the improvements put upon the land by defendant were declared sufficient, from that deduced in the decision of June 11, 1898, in which the improvements were decided to be insufficient to initiate a valid right of settlement. The last opinion is quoted from as follows:

"After a thorough examination of the testimony, the department is of the opinion that the acts of Coate were insufficient to hold the land against the soldier's declaratory filing of Greenameyer.

"If it should be conceded that everything claimed to have been done by Coate in the way of settlement were true, his said acts would not, in the judgment of this department, constitute him a *bona fide* settler prior to the 19th day of September, 1893, when the defendant made his declaratory statement of record."

And it is alleged that defendant—

"Coate reached the land between one and two o'clock on the afternoon of the opening and remained on or adjacent to the claim until the 20th, four days. All that he did in these four days was to stick his flag and dig a hole which he calls a starting of a well, two feet deep and two and a half or three feet across. He then left and went back to his home in Kansas, 150 miles distant. The digging of this hole would not require more than an hour's labor by one man. This was all he did between the 16th and 20th, while he remained on or near this claim, to his return to Kansas, the rest of his time he spent 'watching people off' of the claim and in going to Newkirk on the 19th to 'file by mail.' He did not return to the claim after leaving on the 20th of September until the 22d of October, and his return at that time was due to the fact that he received a letter from one White, stating a soldier had filed on the land."

It is alleged that the two decisions were made upon "precisely the same state of facts;" that the decision of June 21, 1898, and October 5, 1898, correctly applied the law, and that of July 3, 1900, reversing the prior decisions, misapplied the law.

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For a second cause of action plaintiff alleged the foregoing facts, and further alleged that fraud and deceit were practiced upon the land office by defendant, which caused the defeat of plaintiff in the litigation, and that by cunning and deceit defendant so concealed his fraudulent practices from plaintiff that the latter was unable to procure evidence to prove the fraud in the contest suit. That about the first of December, 1893, the plaintiff learned that defendant was the owner of and in possession of 160 acres of land in Morris County, Kansas; that he obtained an abstract of the "registry records" of Morris County, which showed that defendant was owner of 180 acres of land, and July 9, 1894, he further learned that in January of that year defendant had fraudulently placed on record a deed for the land to his son-in-law, to enable defendant to make proof before the Land Department, and that plaintiff was unable to obtain proof thereof in time to use in said contest. That the nature of defendant's fraud was such that he could and did conceal it from plaintiff and the Land Department; that the deed, while it was executed upon the twenty-seventh of January, 1894, was antedated so as to appear to have been made August 30, 1893, and that by these fraudulent means defendant caused it to appear that he had sold and conveyed the land on the thirtieth of August, 1893, whereas he continued to own the same until January, 1894, and was therefore disqualified from taking and holding any interest in the land involved in the action. And it is alleged that defendant introduced in evidence in the contest cause a certified copy or statement from the records of Morris County, in order to deceive the Land Department and defraud plaintiff, and to establish that defendant had the necessary qualifications to make entry and settlement upon the land.

It is alleged that plaintiff has but recently discovered the "evidence to prove the foregoing charge of fraud, concealment and imposition, and is now able to prove the facts as to both as set forth." Other facts will appear in the opinion.

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Mr. John W. Adams, Mr. Kos Harris and *Mr. William E. Keith*, for appellant:

A party by acquiescing in, or acknowledging the title of another, or standing by and seeing another making costly improvements or recognizing a claim or lien of another, is estopped from subsequently disputing its validity. 2 Herman on Estoppel, § 1069; *Broyles* v. *Nowlin*, 59 Tennessee, 191; *Moale* v. *Baltimore*, 56 Maryland, 496; *Hart* v. *Huguet*, 33 La. Ann. 362; *Betts* v. *Worth*, 32 N. J. Eq. 32.

Coate could have had no right to a patent, if he had not filed thereon in the manner provided by the statute. It was, therefore, a misapplication of the law to receive or consider proof denying the soldier's preference right, once solemnly recognized in the very filing made by Coate, without which he could have no right under the facts in the contest case.

The allegations of the petition present such a case of fraud, cunning and deceit as will warrant a court of equity to grant relief. *Johnson* v. *Towsley*, 13 Wall. 72, 86; *Vance* v. *Burbank*, 101 U. S. 514; *Craig* v. *Leitensdorfer*, 123 U. S. 212; *Gonzales* v. *French*, 164 U. S. 342; *Quimbie* v. *Conlan*, 104 U. S. 425; *Lytle* v. *Arkansas*, 22 How. 203; *Calhoun* v. *Violet*, 173 U. S. 63.

The legal title has passed from the Government, and the plaintiff could not obtain any relief in the Land Department, but in cases of this kind, where a patent has been wrongfully or fraudulently obtained, equity will treat the fraudulent patentee as a trustee for the party against whose rights the fraud has operated and decree a transfer of the legal title to the party who, but for the wrong or fraud, would have received the title. *In re Emblem*, 161 U. S. 52; *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *St. Louis Smelt. & Refining Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *St. Louis Smelting Co.*, 106 U. S. 447; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47; *Turner* v. *Sawyer*, 150 U. S. 578; *Emblem* v. *Lincoln Land Co.*, 184 U. S. 659.

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Mr. W. S. Cline and *Mr. C. L. Pinkham* for appellee:

The question of what are sufficient acts of good faith on the part of one settling upon government land, and what particular acts are sufficient evidence of the continuance of an original act of settlement which segregates the tract settled upon, must necessarily vary with the varying circumstances of each particular case, and the determination of such question must be left to the judgment of those tribunals which are established for the purpose of disposing of the public land; and when such tribunals determine in good faith that the law has been complied with in a particular case, their determination is final. *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *Burfenning* v. *C., St. P., M. & O. Ry. Co.*, 163 U. S. 323; *Vance* v. *Burbank*, 101 U. S. 514; *Quinby* v. *Conlan*, 104 U. S. 420; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Baldwin* v. *Starks*, 107 U. S. 463; *De Cambra* v. *Rogers*, 189 U. S. 119.

If there is any evidence which tends, in any degree, however slight, to support the conclusion of the Secretary as announced in his opinion, then such conclusions become final, and a court of equity will not interfere.

The findings of Secretary Bliss were not ultimate findings of fact in said contest proceedings. While said contest proceeding was pending before the department, the Secretary of the Interior granted the petition for rehearing of the defendant, and after a retrial of the contest case, and on the facts adduced on the retrial of said contest it was found by the land tribunal that the defendant was entitled to the land.

The department merely reconsidered a question passed upon in the progress of the cause. The findings of Secretary Hitchcock became and are the findings of ultimate facts, finally reached in said contest. See *Potter* v. *Hall*, 189 U. S. 292.

As to the contention of appellant that fraud and imposition were practiced upon him and upon the Land Department, the appellant has not brought himself within the rule under which courts of equity will grant relief. *Vance* v. *Burbank*, 101 U. S. 514; *De Cambra* v. *Rogers*, 189 U. S. 119; *United States* v.

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Throckmorton, 98 U. S. 65; *Friese* v. *Hummel et al.*, 37 Pac. Rep. 458; *Estes* v. *Timmons*, 12 Oklahoma, 537; *S. C.*, 73 Pac. Rep. 303.

The fraud practiced which is sufficient to set aside the final judgment is one that arises extrinsically, that prevents a party from having a fair trial, or having any trial for the development of the facts, and not a case where a full, fair and free trial is had or tendered, wherein the person alleged to have been defrauded was present in person and by attorney, and heard and saw what is alleged to have been the perpetration of a fraud, and had then and there the opportunity to refute it, which he failed to do, or, believing himself to have successfully done it, submits his cause for final determination. In such case, the conclusion reached is final. See *Hass* v. *Billings* (Minn.), 43 N. W. Rep. 797, affirmed, *Wilkins* v. *Sherwood*, 56 N. W. Rep. 591; *Gray* v. *Barton* (Mich.), 23 N. W. Rep. 813; *Lee* v. *Johnson*, 116 U. S. 48; *Cothausen* v. *Kerting* (C. C.), 29 Fed. Rep. 821; *Friese* v. *Hummel* (Ore.), 37 Pac. Rep. 458.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The case presents apparently contradictory decision between two Secretaries of the Interior and plaintiff contends upon the same set of facts. But this contention is not sustained by the record. The first decision of the local office was adverse to the plaintiff, but the decision was reversed by the Interior Department, the Commissioner and the Secretary of the Interior taking a different view of the facts from that taken by the local land office. But a rehearing was granted, and while in the opinion granting it the Secretary repeated his view of the facts, further testimony was allowed to be introduced. Further testimony was introduced, and the local office found that, while it was conflicting—

"the preponderance of it showed: First. That the contestant settled on the land in controversy on the afternoon of Septem-

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ber 16, 1893; that he put up a flag and commenced a well; that he remained thereon until the 20th of September, 1893; that he returned in October, 1893, and built a small house, put up a few trees and had some breaking done; that he again went to Kansas in November, 1893, and remained there until February, 1894, when he again returned to the land in controversy and built a large and better house; that he has resided [upon], improved and cultivated part of the said land from that time to the present; that he has substantially complied with all the requirements of the homestead law.

"Second. We find that his absence from the land from November, 1893, to February, 1894, was excusable because of his financial and physical condition.

* * * * * * * *

"Fourth. We find that there was no fraud in conveying the land formerly owned by the contestant to his son-in-law some months before the opening of the country to settlement.

"Fifth. That the settlement rights of the contestant were commenced before the defendant filed his soldier's declaratory statement, and that the said rights so acquired have been followed up as required by law."

The office recommended that the entry of the defendant "be permitted to stand." The finding and decision were successively affirmed by the Commissioner of the General Land Office and the Secretary of the Interior, in an elaborate opinion, in which the testimony was quoted and commented upon. And to these decisions we must look as the ultimate action of the Department. It is of no legal consequence that different views were expressed in other decisions. It is not contended that Secretary Hitchcock, when he rendered the last decision, did not have complete jurisdiction of the case. It seems to be contended that he was bound by the facts found by his predecessor, Mr. Bliss, and that this court is likewise so bound. The contention is untenable. *Potter* v. *Hall*, 189 U. S. 292. In that case it was said:

"The fact that the final conclusion as to the ultimate facts

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reached by the Department differed from the conception of such ultimate facts entertained by the Department in previous stages of the controversy, affords no ground for disregarding the conclusion of ultimate fact finally reached, which was binding between the parties."

But besides, as we have seen, additional testimony was taken. It was upon that testimony, as well as upon that which was before Secretary Bliss, that the decision of Secretary Hitchcock was based. It is true the petition alleges that such decision was made upon "precisely the same state of facts" as that of Secretary Bliss, but the allegation is contradicted by the exhibits which are attached to the petition and expressly made part thereof.

The contentions upon which plaintiff bases his second cause of action are equally without merit. The issue of fraud which plaintiff made upon the ownership of land in Kansas and the conveyance thereof to his son-in-law was passed on by the Land Department and decided adversely to plaintiff. There was evidence other than copies of the record. The integrity of the deed by the defendant to his son-in-law was challenged. The evidence is not recited in the opinion of the local land office. It is recited in the opinion of Secretary Hitchcock, and it tended to show that the deed was a consummation of transactions between defendant and his son-in-law which established its validity, and which were inconsistent with the supposition of its having been antedated. However, the issue was met and decided upon testimony submitted, and no fact is alleged which supports the statement that plaintiff was prevented from exhibiting his whole case. He had certainly plenty of time for preparation. The land was opened to settlement September 3, 1893. On the nineteenth of that month plaintiff filed his soldier's declaratory statement upon the land. Defendant made his homestead entry November 24, 1893, and on the twenty-eighth of March, 1894, instituted a contest against plaintiff, which was not heard until October 18, 1895. A decision was rendered on such contest October 24, 1895.

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The progress of the case was somewhat slow in the Interior Department, the rehearing applied for by defendant being granted February, 1899, five years after the institution of the contest. It thus appears that plaintiff had from the twenty-eighth of March, 1894, until October 18, 1895, to prepare for the first hearing upon the contest, and had over five years to the final hearing, in 1899. And he alleges that he had learned as early as January, 1894, that the deed of defendant to his son-in-law was fraudulent. It is true he attempted to show diligence in his investigations, but all he did was to visit Morris County in 1894, and to send an attorney there in 1899, who discovered nothing. And he finally alleges, that on or about the first of March, 1901, which was after the proceedings in the Land Department had closed, he learned "of the existence of proof sufficient to substantiate the allegations of fraud and imposition on the defendant's part." From whom or how he learned it or what defendant did to keep it from him, is not alleged. These allegations only show that the plaintiff has further evidence upon one of the issues made before the Land Department, which he had abundance of time and opportunity to discover and present, and no fact is alleged that anything was done to prevent him from discovering or presenting it, except the general allegation that cunning and deceit were practiced upon him. Of what they consisted he does not allege, or why they endured and were successful for over five years and until the case was closed in the Land Department.

The case therefore falls within the doctrine of *Vance* v. *Burbank*, 101 U. S. 514, 519; *De Cambra* v. *Rogers*, 189 U. S. 119; *Estes* v. *Timmons*, 199 U. S. 391; *United States* v. *Throckmorton*, 98 U. S. 65; *Friese* v. *Hummel* (Ore.), 37 Pac. Rep. 458. In *Vance* v. *Burbank*, *supra*, this court said, expressing the principle that is to be applied in cases like that at bar:

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may

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properly be said there never has been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. *United States* v. *Throckmorton*, 98 U. S. 61; *Marquez* v. *Frisbie*, *supra*. The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute."

The cases adduced by plaintiff are consistent with that principle. They only declare the general doctrine that the holder of a patent may be declared to hold the same as trustee for another when he has procured it by an error of law committed by the Land Department, the facts being undisputed, or by fraud or imposition upon that Department. Of the character of the fraud and in what way or under what circumstances exerted in order to be a ground of relief, the cases we have cited are examples.

Decree affirmed.

FREDERIC L. GRANT SHOE COMPANY *v.* W. M. LAIRD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

No. 35. Argued December 2, 1908.—Decided February 23, 1909.

The time within which a writ of error may be brought to review an adjudication of bankruptcy of the District Court is two years as regulated by §§ 4, 5, of the act of March 3, 1891, c. 517, 26 Stat. 826, 827, and not thirty days, the time fixed for appeals by general order of this court in bankruptcy, No. 36. *Allen* v. *Southern Pacific Co.*, 173 U. S. 479.

A bill of exceptions is not necessary when it adds nothing to the record. *C. H. Nichols Lumber Co.* v. *Franson*, 203 U. S. 278.

The objections to a double resort to review decisions of the lower courts to both the Circuit Court of Appeals and this court do not apply where the proceeding in the Circuit Court of Appeals is merely revisory as

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it is under § 24*b* of the Bankruptcy Act; and a merely interlocutory decision in such a proceeding cannot prevent a case otherwise proper to be brought here, from being taken to this court after final judgment.

Provable claims, on which a petition to have the debtor adjudicated a bankrupt under § 59*b* of the Bankruptcy Act can be based, are claims that can be proved in the proceedings, and a liquidation may be ordered on the filing of the petition to ascertain whether the petition is based on a provable claim.

A provable claim may be based on the breach of an express warranty.

THE facts are stated in the opinion.

Mr. P. M. French for plaintiff in error.

Mr. Hiram R. Wood for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes up on a certificate concerning the jurisdiction of the District Court on the following facts: The W. M. Laird Company filed a petition in bankruptcy against the Frederic L. Grant Shoe Company, alleging acts of bankruptcy and setting up a claim for $3,732.80 for the breach of an express warranty of shoes sold to it by the latter. The Shoe Company answered, denying the foregoing allegations, and denying that the claim alleged was a provable claim. The case coming on to be tried before a jury, it moved the court to dismiss the proceeding for want of jurisdiction. The motion was denied, and insolvency and acts of bankruptcy being admitted, the claim was liquidated at $3,454, the Shoe Company offering no evidence. The Shoe Company was adjudged a bankrupt, and at the same time the judge certified that the jurisdiction of the court to make such an adjudication on a claim for unliquidated damages was the only question in issue. Afterwards this writ of error was brought, the taking of jurisdiction being the only error assigned.

It already has been decided between these parties that a writ of error, not an appeal, is the proper means of bringing the

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case here. 203 U. S. 502. But the defendant in error moves to dismiss on the grounds that the writ was not sued out in time, because General Order 36 (2), allows only thirty days for appeals; and that no bill of exceptions was filed. Neither reason is good. The statutes fix the time within which writs of error may be brought. Rev. Stat. § 1008. See Act of March 3, 1891, c. 517, §§ 4, 5; 26 Stat. 826, 827; *Allen* v. *Southern Pacific R. R. Co.*, 173 U. S. 479, 486. A bill of exceptions was not necessary, as it would have added nothing to what is patent on the face of the record. *C. H. Nichols Lumber Co.* v. *Franson*, 203 U. S. 278.

Perhaps it should be mentioned that a motion to dismiss, earlier than the one we have mentioned, was made and overruled, 125 Fed. Rep. 576, and that thereafter, on a petition for review, the decision was affirmed by the Circuit Court of Appeals. 130 Fed. Rep. 881. Although in the report the case is headed "In Error to the District Court," it appears by stipulation that the proceeding was a revisory one under § 24*b* of the Bankruptcy Act, the order having been interlocutory. It is suggested that the plaintiff in error is concluded by the action of the Circuit Court of Appeals. But notwithstanding the objections to a double resort, we do not perceive how such an interlocutory decision, even of the higher court, can prevent a case, otherwise proper to be brought here, from being taken up after a final judgment is reached.

Coming to the question certified, we are of opinion that the decision of the courts below was right. The argument to the contrary is based on the letter of the statute, and is easily stated and understood. By § 59*b* petitions to have a debtor adjudged a bankrupt may be filed only by creditors who have provable claims. By § 63*b*, "Unliquidated claims against the bankrupt, may, pursuant to application to the court, be liquidated in such a manner as it shall direct, and may thereafter be proved and allowed against his estate." The word "thereafter" shows, it is said, that they are not yet proved to exist when merely presented and sworn to. Therefore it does not

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yet appear that there is any foundation for the proceeding, in the requisite amount or even the existence of the claim. But there must be a proceeding in court before a liquidation can take place, and, therefore, the claim cannot be liquidated until a proceeding is started in some other way. In short, the claim upon which the petition is based must be provable when the petition is filed, and this claim was not provable then since by the express words of the act it had to be liquidated before it could be proved.

On the other hand, by the equally express words of § 63*a*, among the debts that may be proved are those founded upon a contract, express or implied. Again, by § 17, the discharge is of all "provable debts" with certain exceptions, and it would not be denied that this claim would be barred by a discharge. *Tindle* v. *Birkett*, 205 U. S. 183. If the argument for the plaintiff in error is sound a creditor for goods sold on a *quantum valebant* would be as badly off as the petitioner, and both of them might be postponed in reducing their claims to judgment until it was too late. The intimation in *Tindle* v. *Birkett*, *sup.* and *Crawford* v. *Burke*, 195 U. S. 176, are adverse to such a result. The whole argument from the letter of the statute depends on reading "provable claims" in § 59*b* as meaning claims that may be proved then and there when the petition is filed. But if it can be seen then and there that the claims are of a kind that can be proved in the proceedings the words are satisfied; and further, no reason appears why a liquidation may not be ordered on the filing of the petition to ascertain whether it is filed rightly or not.

It is said that an unfounded claim of this sort might be used as a weapon to enforce an unjust demand or to make a solvent but struggling debtor bankrupt. *In re Big Meadows Gas Co.*, 113 Fed. Rep. 974. But an unjust demand may be made for a liquidated sum also, and we have mentioned the injustice on the other side. Again it has been suggested that a cause of action for a breach of warranty really is for deceit and sounds in tort, claims for torts not being mentioned among the "Debts

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which may be proved" in § 63*a*. *In re Morales*, 105 Fed. Rep. 761. No doubt at common law a false statement as to present facts gave rise to an action of tort, if the statement was made at the risk of the speaker, and led to harm. But ordinarily the risk was not taken by the speaker unless the statement was fraudulent, and it was precisely because it was a warranty, that is, an absolute undertaking by contract that a fact was true, that if a warranty was alleged it was not necessary to lay the *scienter*. *Schuchardt* v. *Allens*, 1 Wall. 359; *Norton* v. *Doherty*, 3 Gray, 372. In other words, a claim on a warranty as such necessarily was a claim arising out of a contract, even if in case of actual fraud there might be an independent claim purely in tort.

Judgment affirmed.

CARIÑO v. THE INSULAR GOVERNMENT OF THE PHILIPPINE ISLANDS.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 72. Argued January 13, 1909.—Decided February 23, 1909.

Writ of error is the general, and appeal the exceptional, method of bringing cases to this court. The latter method is in the main confined to equity cases and the former is proper to bring up a judgment of the Supreme Court of the Philippine Islands affirming a judgment of the Court of Land Registration dismissing an application for registration of land.

Although a province may be excepted from the operation of act No. 926 of 1903 of the Philippine Commission which provides for the registration and perfecting of new titles, one who actually owns property in such province is entitled to registration under act No. 496 of 1902, which applies to the whole archipelago.

While, in legal theory and as against foreign nations, sovereignty is absolute, practically it is a question of strength and of varying degree; and it is for a new sovereign to decide how far it will insist upon theoretical relations of the subject to the former sovereign and how far it will recognize actual facts.

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The acquisition of the Philippines was not for the purpose of acquiring the lands occupied by the inhabitants, and under the Organic Act of July 1, 1902, c. 1369, 32 Stat. 691, providing that property rights are to be administered for the benefit of the inhabitants, one who actually owned land for many years cannot be deprived of it for failure to comply with certain ceremonies prescribed either by the acts of the Philippine Commission or by Spanish law.

The Organic Act of the Philippines made a bill of rights embodying safeguards of the Constitution, and, like the Constitution, extends those safeguards to all.

Every presumption of ownership is in favor of one actually occupying land for many years, and against the Government which seeks to deprive him of it, for failure to comply with provisions of a subsequently enacted registration act.

Title by prescription against the crown existed under Spanish law in force in the Philippine Islands prior to their acquisition by the United States, and one occupying land in the Province of Benguet for more than fifty years before the Treaty of Paris is entitled to the continued possession thereof.

7 Philippine Rep. 132, reversed.

The facts are stated in the opinion.

Mr. Frederic R. Coudert and *Mr. Howard Thayer Kingsbury*, with whom *Mr. D. R. Williams* and *Mr. Charles C. Cohn* were on the brief, for plaintiff in error:

The Land Registration Court had jurisdiction of the subject-matter under act No. 496, §§ 2, 19; and its decision was legal, just and in conformity with the protection of private property provision of the Treaty of Paris. Public Land Act, No. 926. This court has jurisdiction and writ of error is the proper method.

The proceeding is one *in rem* and not *in personam* as it deals with titles to real estate. See § 705, Rev. Stat.; 27 Stat. 434; 31 Stat. 1189, 1227; *Ormsby* v. *Webb*, 134 U. S. 47; *Met. Railroad Co.* v. *Dist. of Columbia*, 195 U. S. 322; *Steinmetz* v. *Allen*, 192 U. S. 543; *Lowry* v. *Allen*, 203 U. S. 476; *Smith* v. *Whitney*, 116 U. S. 167; *Massie* v. *Watts*, 6 Cranch, 148, 158; *Boston Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 641; Philippine Code Civ. Pro., Act 190, Phil. Com., § 498.

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The land belonged to Cariño under the Igorot law. He had inherited it from his ancestors in accordance with the native customs and his title had never been questioned. The Spanish law explicitly recognized and scrupulously protected the Indian titles. Possession of land under such circumstances confers a property right *jure gentium* independently of any rule of prescription.

Spanish law recognized and protected rights of the native occupants of its Indian possessions even more fully and scrupulously than our Government has done in the case of its Indian wards. See Arthur Helps, Spanish Conquest in America.

Claimant having actually possessed the land in question for more than thirty years had acquired, under the Spanish Civil Code, good prescriptive title. The provisions of this Code as to prescription apply to all lands in the Philippine Islands regardless of whether owned by the Government or not, just as they admittedly do in the Spanish Peninsula itself.

The provisions of the Civil Code applied to public agricultural lands as well as to other lands, and a detailed examination of the provisions relating to public lands shows no intention on the part of the Government to except them from the purview of the Code enactments as to prescription, but on the contrary recognize the applicability of the common or general law. *Valenton* v. *Murciano*, 3 Philippine, 537, to the effect that public agricultural lands were not within the purview of the Code provisions, is unsound, inconsistent with other decisions of that court, and can be distinguished. Phil. Com. Rep. 1902, Part I, 183; Census of Philippine Islands, 1903, Vol. 1, 533; Phil. Com. Rep. 1904, Pt. I, 574; 1905, Pt. I, 176; "1 Bontoc Igorot," by Albert Ernest Jenks, Ethnological Survey Publication, Interior Dept., Manila, P. I., 1905; *United States* v. *Paine Lumber Co.*, 206 U. S. 467; *Lone Wolf* v. *Hitchcock*, 187 U. S. 564; *Doe* v. *Wilson*, 23 How. 463; "Laws of the Indies," Book 6, Title 1, Law 1; and see in Book 6, Title 1, Laws 15, 23, 27, 30, 32; Book 6, Title 3, Laws 9, 26; Book 2, Title 1, Laws 4, 5; Book 4, Title 1, Laws 6, 8, 10; Book 4,

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Title 12, Laws 5, 7, 9, 14, 16, 17, 18, 19; Justinian Code, Book 7, Title 37, c. 1; Book 7, Title 39, c. 4, c. 9; Royal Decree, February 31, 1889; 2 Alcubilla (5th ed.), 692; Third Partida, Title 29, Laws 7, 18, 21.

Translation of the Civil Code in force in Cuba, Porto Rico, and the Philippines, 1893, War Dept. 1899, Arts. 339, 340, 342, 345; and Arts. 1930–6, 1959; *Rosa* v. *Natalio*, 7 Philippine, 556; Francisco Aragon Gonzalez, decided by Supreme Court Spain, April 16, 1881; 46 Jurisprudencia Civil, 9; Madrid, 1882; 3 Sanchez Roman, p. 277, and Alcubilla, 1906, 602; The Sixth Partida, Title 19, Law 10; The Novisima Recopilacion, Book XI, Title 8, Law 4; Ordenanzas Reales de Castilla, Book III, Title 13, L. VI; Bracton, Lib. 2, c. 5, § 7, as cited by Story, J., in *United States* v. *Hoar*, 2 Mason, 311; *S. C.* Fed. Cas. No. 15,373; Pollock & Maitland, Hist. Eng. Law, Vol. I, 572; Vol. II, 144; Statute of 9 Geo. III, 3, c. 16, *Valenton* v. *Murciano*, 3 Philippine, 540; Philippine "Mortgage Law," § 389; Royal Cedula of October 15, 1754; Royal Decree of June 25, 1880, Arts. 4 and 5; "Guia de Compradores de Terrenos Baldios y Realengos de Filipinas," Berriz, 1886, pp. 17–23; Spanish Civil Code, Arts. 348, 467, 1930, 1940, 1952, 1959, *et seq.*; "Land Registration Act" of 1902, § 19, Cl. 1st; Law 1 and Law 2, Title 34, Book II, Novisima Recopilacion; Alcubilla, Vol. 8, p. 776, note 4; Art. X, Const. of Spain, June 30, 1876; Art. VIII, Regulations of 1880.

Cariño had a legal title under the Civil Code. Registration was a mere procedural formality and did not create property. In any event, he had a right of property under Spanish law which was protected by the Treaty of Paris. *Buenaventura* v. *Commanding General*, 6 Philippine, 601; Treaty of Paris; Compilation of Treaties, 1904, 725; *Delassus* v. *United States*, 9 Peters, 133; Act temporarily to provide for the affairs of civil government in Philippine Islands, July, 1902, §§ 12, 14, 16; Public Land Act, No. 926, Comp. Laws and Regulations of Public Lands in Philippine Islands War Dept., Bureau of Insular Affairs, 1908, Chapter VI, § 54; Compilation of Laws and Regulations relating to Public Lands in the Philippine Islands.

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Government Ptg. Office, February 1, 1908; 3 Philippine, 543; 6 Philippine, 606; *Strother* v. *Lucas* (1838), 12 Peters, 436; Philippine Code Civ. Pro., § 41; Circular of August 10, published in the Gaceta de Manila, August 11, 1881; Royal Decree of September 24, 1884, Art. 11; Royal Decree of February 13, 1894, Art. 4, § 21.

The Solicitor General, with whom *Mr. Paul Charlton* was on the brief, for defendant in error:

The court is without jurisdiction on writ of error. It can only take jurisdiction on appeal. § 10, act of July 1, 1902; 32 Stat. 691. This court can only review actions at law pending in Circuit Courts by writ of error and proceedings in equity only by appeal. The proceedings for the adjudication and registration of titles to lands in the Philippine Islands are in their nature actions in equity rather than actions at law. Act No. 496, Philippine Commission, §§ 2, 14, 16, 21, 35–38, 40. See *Holland* v. *Challen*, 110 U. S. 15; *Clark* v. *Smith*, 13 Pet. 195; *Dower* v. *Richards*, 151 U. S. 658; *Chase* v. *United States*, 155 U. S. 480.

Plaintiff in error possessed no title in the lands at the date of the change of sovereignty from Spain to the United States. During the period of Spanish sovereignty the tribe of Igorots had not been segregated from the body of the Philippine people as to the operation of the general law; no reservation of land was set aside for them, nor did the Spanish Government interfere in their internal tribal affairs. The status of the Igorot in his relation to the Spanish laws is not analogous to that of the American Indian in relation to the laws of the United States, and the cases affecting the tribal rights of Indians have no application to any rights of plaintiff in error, *jure gentium* or otherwise.

Plaintiff's claim of title advanced in the Philippine courts, based mainly upon "prescription" as valid against the Crown of Spain and therefore surviving the change of sovereignty and requiring to be recognized under the Treaty of Paris, is untenable under Spanish law. While that law made ample pro-

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vision for the protection of rights claimed under ancient possession, it was in each case necessary that evidence of title should be submitted to the proper administrative officials. 4 Recopilacion de Leyes de las Indias, law 1, title 12; *Id.*, law 8; *Id.*, law 14; 4 Legislacion Ultramarina, 673; arts. 3, 4, 5; *Id.*, p. 688; Gaceta de Manila, Nov. 15, 1864; Guia del Comprador Terrenos, p. 5; Gaceta de Manila, Sept. 10, 1880; *Id.*, Aug. 11, 1881; *Id.*, April 17, 1894; see also *Valenton* v. *Murciano*, 3 Phil. Rep. 537; *Cansino* v. *Valdez*, 6 Phil. Rep. 320; *Tiglao* v. *Insular Government*, 7 Phil. Rep. 80. The Spanish law in force when the United States took possession of the Philippines required that all persons claiming title to public lands by prescription should, long prior to that date, have presented and proved their claims, complied with the legal regulations, and secured title by administrative adjudication, upon penalty of becoming mere trespassers and subject to ejectment. Plaintiff in error did not comply with these requirements, the time within which he could have done so had long passed, and he was therefore in the eyes of the law a trespasser on the public lands of the Philippine Islands at the date when the islands passed to the sovereignty of the United States. Under the accepted principles of international law the local laws of Spain applicable to the Philippines, including the mortgage law and the Civil Code, were continued in force by the Government of the United States upon the cession of the islands, so far as they were not incompatible with the fundamental principles of our Government. *American Ins. Co.* v. *Canter*, 1 Pet. 511; *Cross* v. *Harrison*, 16 How. 164; *Leitensdorfer* v. *Webb*, 20 How. 176.

The situation of plaintiff in error has not been changed by legislation of the United States or of the Philippine Islands since the change of sovereignty. The act of March 2, 1901, 31 Stat. 910, continued the status of the public lands until further action by Congress. The organic act of July 1, 1902, empowered the Philippine Government created thereby to promulgate rules and regulations governing the public lands. In pursuance of the powers so conferred, the Philippine Gov-

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ernment established a court of land registration and prescribed such rules and regulations. Philippine Acts, Nos. 496, 926. These were, however, suspended as to the Province of Benguet in which the land in controversy is situated, and for that reason there was no forum in which plaintiff could have legally established the title he claimed. Accordingly the court of Land Registration in attempting to hear and determine his rights was without jurisdiction. This land was a military reservation of the United States, and military and other reservations were excepted from the provision of the organic act that property acquired from Spain should be administered for the benefit of the inhabitants of the Philippines. Further, in reference to the sale of public lands to actual occupants or settlers and others, as in reference to perfecting title to those who prior to the transfer of sovereignty had fulfilled all or some of the conditions required by the Spanish law for the acquisition of legal title, yet had failed to secure conveyance of title, there is an express restriction to an area of 16 hectares, and the tract here contains 150 hectares. Sections 12, 16, act of July 1, 1902, 32 Stat. 691, 695, 696.

MR. JUSTICE HOLMES delivered the opinion of the court.

This was an application to the Philippine Court of Land Registration for the registration of certain land. The application was granted by the court on March 4, 1904. An appeal was taken to the Court of First Instance of the Province of Benguet, on behalf of the Government of the Philippines and also on behalf of the United States, those Governments having taken possession of the property for public and military purposes. The Court of First Instance found the facts and dismissed the application upon grounds of law. This judgment was affirmed by the Supreme Court, 7 Philippine, 132, and the case then was brought here by writ of error.

The material facts found are very few. The applicant and plaintiff in error is an Igorot of the Province of Benguet, where the land lies. For more than fifty years before the Treaty of

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Paris, April 11, 1899, as far back as the findings go, the plaintiff and his ancestors had held the land as owners. His grandfather had lived upon it, and had maintained fences sufficient for the holding of cattle, according to the custom of the country, some of the fences, it seems, having been of much earlier date. His father had cultivated parts and had used parts for pasturing cattle, and he had used it for pasture in his turn. They all had been recognized as owners by the Igorots, and he had inherited or received the land from his father in accordance with Igorot custom. No document of title, however, had issued from the Spanish Crown, and although in 1893–1894, and again in 1896–1897, he made application for one under the royal decrees then in force, nothing seems to have come of it, unless, perhaps, information that lands in Benguet could not be conceded until those to be occupied for a sanatorium, etc., had been designated, a purpose that has been carried out by the Philippine Government and the United States. In 1901 the plaintiff filed a petition, alleging ownership, under the mortgage law, and the lands were registered to him, that process, however, establishing only a possessory title, it is said.

Before we deal with the merits we must dispose of a technical point. The Government has spent some energy in maintaining that this case should have been brought up by appeal and not by writ of error. We are of opinion, however, that the mode adopted was right. The proceeding for registration is likened to bills in equity to quiet title, but it is different in principle. It is a proceeding *in rem* under a statute of the type of the Torrens Act, such as was discussed in *Tyler* v. *Court of Registration*, 175 Massachusetts, 71. It is nearer to law than to equity, and is an assertion of legal title; but we think it unnecessary to put it into either pigeon hole. A writ of error is the general method of bringing cases to this court, an appeal the exception, confined to equity in the main. There is no reason for not applying the general rule to this case. *Ormsby* v. *Webb*, 134 U. S. 47, 65; *Campbell* v. *Porter*, 162 U. S. 478; *Metropolitan R. R. Co.* v. *District of Columbia*, 195 U. S. 322.

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Another preliminary matter may as well be disposed of here. It is suggested that even if the applicant have title he cannot have it registered, because the Philippine Commission's Act No. 926, of 1903, excepts the Province of Benguet among others from its operation. But that act deals with the acquisition of new titles by homestead entries, purchase, etc., and the perfecting of titles begun under the Spanish law. The applicant's claim is that he now owns the land and is entitled to registration under the Philippine Commission's Act No. 496, of 1902, which established a court for that purpose with jurisdiction "throughout the Philippine Archipelago," § 2, and authorized in general terms applications to be made by persons claiming to own the legal estate in fee simple, as the applicant does. He is entitled to registration if his claim of ownership can be maintained.

We come then to the question on which the case was decided below, namely, whether the plaintiff owns the land. The position of the Government, shortly stated, is that Spain assumed, asserted and had title to all the land in the Philippines except so far as it saw fit to permit private titles to be acquired; that there was no prescription against the Crown, and that if there was, a decree of June 25, 1880, required registration within a limited time to make the title good; that the plaintiff's land was not registered and therefore became, if it was not always, public land; that the United States succeeded to the title of Spain, and so that the plaintiff has no rights that the Philippine Government is bound to respect.

If we suppose for the moment that the Government's contention is so far correct that the Crown of Spain in form asserted a title to this land at the date of the Treaty of Paris, to which the United States succeeded, it is not to be assumed without argument that the plaintiff's case is at an end. It is true that Spain in its earlier decrees embodied the universal feudal theory that all lands were held from the Crown, and perhaps the general attitude of conquering nations toward people not recognized as entitled to the treatment accorded to those

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in the same zone of civilization with themselves. It is true also that in legal theory sovereignty is absolute, and that as against foreign nations, the United States may assert, as Spain asserted, absolute power. But it does not follow that as against the inhabitants of the Philippines the United States asserts that Spain had such power. When theory is left on one side sovereignty is a question of strength and may vary in degree. How far a new sovereign shall insist upon the theoretical relation of the subjects to the head in the past and how far it shall recognize actual facts are matters for it to decide.

The Province of Benguet was inhabited by a tribe that the Solicitor General, in his argument, characterized as a savage tribe that never was brought under the civil or military government of the Spanish Crown. It seems probable, if not certain, that the Spanish officials would not have granted to any one in that province the registration to which formerly the plaintiff was entitled by the Spanish laws, and which would have made his title beyond question good. Whatever may have been the technical position of Spain, it does not follow that, in the view of the United States, he had lost all rights and was a mere trespasser when the present Government seized his land. The argument to that effect seems to amount to a denial of native titles throughout an important part of the island of Luzon, at least, for the want of ceremonies which the Spaniards would not have permitted and had not the power to enforce.

The acquisition of the Philippines was not like the settlement of the white race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land. It is obvious that, however stated, the reason for our taking over the Philippines was different. No one, we suppose, would deny that, so far as consistent with paramount necessities, our first object in the internal administration of the islands is to do justice to the natives, not to exploit their country for private gain. By the organic act of July 1, 1902, c. 1369, § 12, 32 Stat. 691, all the property and rights acquired there by the

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United States are to be administered "for the benefit of the inhabitants thereof." It is reasonable to suppose that the attitude thus assumed by the United States with regard to what was unquestionably its own is also its attitude in deciding what it will claim for its own. The same statute made a bill of rights embodying the safeguards of the Constitution, and, like the Constitution, extends those safeguards to all. It provides that "no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws." § 5. In the light of the declaration that we have quoted from § 12, it is hard to believe that the United States was ready to declare in the next breath that "any person" did not embrace the inhabitants of Benguet, or that it meant by "property" only that which had become such by ceremonies of which presumably a large part of the inhabitants never had heard, and that it proposed to treat as public land what they, by native custom and by long association, one of the profoundest factors in human thought, regarded as their own.

It is true that by § 14 the Government of the Philippines is empowered to enact rules and prescribe terms for perfecting titles to public lands where some but not all Spanish conditions had been fulfilled, and to issue patents to natives for not more than sixteen hectares of public lands actually occupied by the native or his ancestors before August 13, 1898. But this section perhaps might be satisfied if confined to cases where the occupation was of land admitted to be public land and had not continued for such a length of time and under such circumstances as to give rise to the understanding that the occupants were owners at that date. We hesitate to suppose that it was intended to declare every native who had not a paper title a trespasser and to set the claims of all the wilder tribes afloat. It is true again that there is excepted from the provision that we have quoted as to the administration of the property and rights acquired by the United States, such land and property as shall be designated by the President for military or other reser-

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vations, as this land since has been. But there still remains the question what property and rights the United States asserted itself to have acquired.

Whatever the law upon these points may be, and we mean to go no further than the necessities of decision demand, every presumption is and ought to be against the Government in a case like the present. It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land. Certainly in a case like this if there is doubt or ambiguity in the Spanish law we ought to give the applicant the benefit of the doubt. Whether justice to the natives and the import of the organic act ought not to carry us beyond a subtle examination of ancient texts, or perhaps even beyond the attitude of Spanish law, humane though it was, it is unnecessary to decide. If, in a tacit way, it was assumed that the wild tribes of the Philippines were to be dealt with as the power and inclination of the conqueror might dictate, Congress has not yet sanctioned the same course as the proper one "for the benefit of the inhabitants thereof."

If the applicant's case is to be tried by the law of Spain we do not discover such clear proof that it was bad by that law as to satisfy us that he does not own the land. To begin with, the older decrees and laws cited by the counsel for the plaintiff in error seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant. In other words, Spain did not assume to convert all the native inhabitants of the Philippines into trespassers or even into tenants at will. For instance, Book 4, Title 12, Law 14 of the Recopilacion de Leyes de las Indias, cited for a contrary conclusion in *Valenton* v. *Murciano*, 3 Philippine, 537, while it commands viceroys and others, when it seems proper, to call for the exhibition of grants, directs them to confirm those who hold by good grants or *justa prescripcion*. It is true that it

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begins by the characteristic assertion of feudal overlordship and the origin of all titles in the king or his predecessors. That was theory and discourse. The fact was that titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in their books.

Prescription is mentioned again in the royal cedula of October 15, 1754, cited in 3 Philippine, 546: "Where such possessors shall not be able to produce title deeds it shall be sufficient if they shall show that ancient possession, as a valid title by prescription." It may be that this means possession from before 1700, but at all events the principle is admitted. As prescription, even against crown lands, was recognized by the laws of Spain, we see no sufficient reason for hesitating to admit that it was recognized in the Philippines in regard to lands over which Spain had only a paper sovereignty.

The question comes however on the decree of June 25, 1880, for the adjustment of royal lands wrongfully occupied by private individuals in the Philippine Islands. This begins with the usual theoretic assertion that for private ownership there must have been a grant by competent authority, but instantly descends to fact by providing that for all legal effects those who have been in possession for certain times shall be deemed owners. For cultivated land, twenty years uninterrupted is enough. For uncultivated, thirty. Art. 5. So that when this decree went into effect the applicant's father was owner of the land by the very terms of the decree. But it is said, the object of this law was to require the adjustment or registration proceedings that it described, and in that way to require every one to get a document of title or lose his land. That purpose may have been entertained, but it does not appear clearly to have been applicable to all. The regulations purport to have been made "for the adjustment of royal lands wrongfully occupied by private individuals." (We follow the translation in the Government's brief.) It does not appear that this land ever was royal land or wrongfully occupied. In art. 6 it is provided that "interested parties, not included within the two preceding

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articles [the articles recognizing prescription of twenty and thirty years] may legalize their possession, and thereby acquire the full ownership of the said lands, by means of adjustment proceedings, to be conducted in the following manner." This seems by its very terms not to apply to those declared already to be owners by lapse of time. Article 8 provides for the case of parties not asking an adjustment of the lands of which they are unlawfully enjoying the possession, within one year, and threatens that the treasury "will reassert the ownership of the State over the lands," and will sell at auction such part as it does not reserve. The applicant's possession was not unlawful and no attempt at any such proceedings against him or his father ever was made. Finally, it should be noted that the natural construction of the decree is confirmed by the report of the Council of State. That report puts forward as a reason for the regulations that, in view of the condition of almost all property in the Philippines, it is important to fix its status by general rules on the principle that the lapse of a fixed period legalizes completely all possession; recommends in two articles twenty and thirty years, as adopted in the decree; and then suggests that interested parties not included in those articles may legalize their possession and acquire ownership by adjustment at a certain price.

It is true that the language of arts. 4 and 5 attributes title to those "who may prove" possession for the necesssary time, and we do not overlook the argument that this means may prove in registration proceedings. It may be that an English conveyancer would have recommended an application under the foregoing decree, but certainly it was not calculated to convey to the mind of an Igorot chief the notion that ancient family possessions were in danger, if he had read every word of it. The words "may prove," (*acrediten*), as well, or better, in view of the other provisions, might be taken to mean when called upon to do so in any litigation. There are indications that registration was expected from all, but none sufficient to show that for want of it ownership actually gained would be lost.

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The effect of the proof wherever made was not to confer title, but simply to establish it, as already conferred by the decree, if not by earlier law. The royal decree of February 13, 1894, declaring forfeited titles that were capable of adjustment under the decree of 1880, for which adjustment had not been sought should not be construed as a confiscation, but as the withdrawal of a privilege. As a matter of fact, the applicant never was disturbed. This same decree is quoted by the Court of Land Registration for another recognition of the common law prescription of thirty years as still running against alienable crown land.

It will be perceived that the rights of the applicant under the Spanish law present a problem not without difficulties for courts of a different legal tradition. We have deemed it proper on that account to notice the possible effect of the change of sovereignty and the act of Congress establishing the fundamental principles now to be observed. Upon a consideration of the whole case we are of opinion that law and justice require that the applicant should be granted what he seeks, and should not be deprived of what, by the practice and belief of those among whom he lived, was his property, through a refined interpretation of an almost forgotten law of Spain.

Judgment reversed.

SANTOS v. HOLY ROMAN CATHOLIC AND APOSTOLIC CHURCH, PARISH OF TAMBOBONG.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 73. Submitted January 13, 1909.—Decided February 23, 1909.

A finding by the Supreme Court of the Philippine Islands that the parties sued as defendants do not constitute a judicial entity such as a *cofradia*, is not open to reëxamination in this court.

Where the reasons of the Supreme Court of the Philippine Islands for refusing to grant a new trial on ground of newly discovered evidence

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do not appear, their sufficiency must be presumed and the question is not open in this court.

The Roman Catholic Church has a legal personality and the capacity to hold property in the insular possessions of the United States, and this right is not affected by the fact that the property was acquired by gift or from the public funds. *Ponce* v. *Roman Catholic Church*, 210 U. S. 296.

THE facts are stated in the opinion.

Mr. Charles F. Consaul, Mr. George F. Pollock and *Mr. Frank B. Ingersoll* for plaintiffs in error.

No counsel appeared, nor was any brief filed, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought by the defendants in error to recover a chapel. They obtained a judgment which was affirmed by the Supreme Court of the Philippine Islands, and then was brought here by writ of error. The errors assigned are that the court denied the existence of a *cofradia* alleged by the answer to own the property, and held that it was not a "judicial entity," and that it was not entitled to possession; that the court held that the Roman Catholic Church was entitled to the possession of the property; that it denied a motion for a new trial; and that it ordered the defendants to deliver possession to the plaintiffs. The facts found, so far as material, are that the chapel always was devoted to the ceremonies and worship of the Roman Catholic Church until December, 1902, when it was taken possession of by members of an Aglipayan community, who have kept possession and worshipped there up to the present time; that it was built, and, as we gather, the lot on which it stands acquired, from gifts of the residents of the barrio of Concepcion, where the chapel is, these gifts having been intended to be for the uses of the Roman Catholic Church and

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for the exclusive benefit of those who professed the Roman Catholic religion; and that many of the benefactors still wish the chapel to be devoted to the former worship and by the present occupation are deprived of its use.

The finding that the existence of the *cofradia* is not proved is not open to reëxamination here, as only questions of law are brought up. So as to the affirmance of the refusal to grant a new trial on the ground of newly-discovered evidence. The evidence may have been important, but the reasons for the refusal do not appear, and must be presumed to have been sufficient, as they very well may have been. The only questions open are those raised by the decision that the Roman Catholic Church is entitled to the possession of the property, and they now have been answered by *Ponce* v. *Roman Catholic Church*, 210 U. S. 296. In that case, *Barlin* v. *Ramirez*, 7 Philippine, 41, on the authority of which the present case was decided, is referred to with approval; the legal personality of the Roman Church, and its capacity to hold property in our insular possessions, is recognized; and the fact that such property was acquired from gifts, even of public funds, is held not to affect the absoluteness of its right. We think it unnecessary to repeat the discussion. In this case the Roman Catholic Church appears to have been in possession until ejected by the defendants without right, and so far as the facts before this court go appears actually to own the property concerned.

Judgment affirmed.

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THE EUGENE F. MORAN.[1]

CERTIFICATES FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 87, 88. Argued January 22, 25, 1909.—Decided February 23, 1909.

Where two tugs and two scows in tow of one of the tugs are all in fault for a collision, each of the four vessels is liable for an equal share of the damages, and the liability is to be so apportioned even if more than one of the vessels are owned by the same person.

Sturgis v. *Boyer*, 24 How. 110, followed to the effect that a tug having control of a vessel in tow is solely responsible for damages to the other vessel caused by the tug alone.

Fiction, not being a satisfactory ground for taking one man's property to satisfy another man's wrong, should not be extended.

The fact that vessels are tied together in a flotilla does not make the flotilla a unit in proceedings *in rem*.

In a proceeding *in rem* where several vessels are found in fault each bears its share regardless of ownership, and notwithstanding this rule results in charging one who owns more than one of the vessels with a larger proportion than he would be charged in a personal suit against himself and the owners of the other vessels.

When a duty is imposed for the purpose of preventing a certain consequence its breach not leading to that consequence does not make a defendant liable for the tort of a third person merely because the observance of the duty might have prevented that tort.

Questions certified in 154 Fed. Rep. 54, answered.

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[1] Docket titles, No. 87, The Steam Tug "Eugene F. Moran," Michael Moran, Claimant, and the Scows "15 D" and "18 D," the Henry Dubois Sons Co., Claimant, *v.* The New York Central and Hudson River Railroad Company and the Steam Tug "Charles D. Matthews," John D. Daily *et al.*, Claimants; No. 88, The Henry Dubois Sons Company and the Steam Tug "Eugene F. Moran," Michael Moran, Claimant, *v.* the Steam Tug "Charles E. Matthews," John D. Daily *et al.*, Claimants.

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THE facts are stated in the opinion.

Mr. James Emerson Carpenter, with whom *Mr. Samuel Park* and *Mr. James Keith Symmers* were on the brief, for the Henry Dubois Sons Company:

An equitable solution of the problem would be to treat the libellant and the respective claimants as the real parties and to divide the damages equally among the owners of the various vessels at fault irrespective of the form of the action.

In the alternative the tug and tow should be deemed a single vessel, and where the tug and tow are jointly in fault the damages should be divided equally between the tug and tow and a third vessel also in fault, and as between the tug and its tow the moiety should be borne by the owners of the tug and tow respectively in equal parts, subject to the rule laid down in *The Alabama and The Gamecock*, 92 U. S. 695.

In the apportionment of damages in admiralty the fundamental equitable principle is to equalize the burden among those who should bear it. *The North Star*, 106 U. S. 17; *Atlee* v. *Packet Co.*, 21 Wall. 389.

While not possessing the general powers of a court of equity, yet a court of admiralty decides matters before it upon principles of equity. *United States* v. *Cornell Stm. Bt. Co.*, 202 U. S. 184; *The Max Morris*, 137 U. S. 1.

Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care or are guilty of negligence in their navigation. *Sturgis* v. *Boyer*, 24 How. 110, 121, 122. See also *The Mabey and Cooper*, 14 Wall. 204, and *The Virginia Ehrman and The Agnese*, 97 U. S. 309, 313.

The tug Moran and scows for purposes of navigation with reference to other vessels are to be regarded as a single vessel. *Transportation Co.* v. *Philadelphia & Savannah Nav. Co.*, 22

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How. 461; *The Ivanhoe*, 7 Ben. 213; *S. C.*, Fed. Cas. No. 7,113; *The Civilta*, 103 U. S. 699; *The Gladys*, 144 Fed. Rep. 653, 655.

There is a joint liability of the tug and tow for their joint negligence. Where the tug and tow are jointly liable to a third ship the owners of the latter may sue either or both, but a right of apportionment lies between a tug and tow. *The Atlas*, 93 U. S. 302.

The court will not hold the tug and tow jointly liable unless there is fault in both. *The John Frazer*, 21 How. 184; *The Civilta*, 103 U. S. 699; *The Express*, 52 Fed. Rep. 890, 892; *Sturgis* v. *Boyer*, 24 How. 110; *The Clarita*, 23 Wall. 1, 11.

Where both tug and tow are held jointly liable the damages are to be divided between them subject to the rule laid down in the case of *The Alabama and The Gamecock*, 92 U. S. 695.

Where both tug and tow and a third ship are to blame for a collision between the tug or tow and a third ship the tug and the tow will be considered as one vessel and contribute together one-half, the remaining half to be borne by the third vessel. *The Englishman*, L. R. 1894, P. D. 239; *The Komuk*, 120 Fed. Rep. 841; *The Merrill C. Hart*, 162 Fed. Rep. 371; *The Fred. W. Chase* (D. C. D. of S. C. 1887), 31 Fed. Rep. 91.

See also, as bearing on the questions involved: *The Komuk*, 120 Fed. Rep. 841; *The Niobe*, 13 P. D. 55; 1891, App. Cas. 401; *The Brothers*, 2 Biss. 104; *The Nettie L. Tice*, 110 Fed. Rep. 461; *The Express*, 44 Fed. Rep. 392; *S. C.*, 46 Fed. Rep. 860; *S. C.*, 52 Fed. Rep. 890; *The Peshtigo*, 25 Fed. Rep. 488; *The Lyndhurst*, 92 Fed. Rep. 681; *The Anerly*, 58 Fed. Rep. 794; *The W. G. Mason*, 142 Fed. Rep. 913–918; *The James Berwind*, 44 Fed. Rep. 693, 697.

A tug and tow, guilty of a common fault, should be condemned to bear jointly one-half the damages due to collision with a third vessel also in fault, since the tug and tow for the purposes of navigation are deemed in law to be a single vessel under steam and subject to all the responsibilities of such a vessel under the rules. See *The Civilta*, 103 U. S. 701; *Sturgis*

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v. *Boyer*, 24 How. 110; *The Mabey*, 14 Wall. 204; *The Virginia Ehrman*, 97 U. S. 309, 313; *L. P. Dayton*, 120 U. S. 337.

The answer to the third question should be that the damages be equally divided between the two flotillas, and the half assessed on the south-bound flotilla be charged half against the Moran and half against the two scows, the scows having a common owner.

Mr. Archibald G. Thacher and *Mr. Frederick M. Brown* for New York Central and Hudson River Railroad Company:

A tug and her tows should be regarded as a navigable unit, responsible to the extent of the total value of the unit to innocent third parties; the rights of the owners of the component parts to be adjusted between themselves.

Sturgis v. *Boyer*, 24 How. 110, which holds the contrary, should be reconsidered by this court in the light of other decisions. *The Palmyra*, 12 Wheat. 1, 14; *The Brig Malek Adtel*, 2 How. 210; *Schooner Freeman* v. *Buckingham*, 18 How. 182; *The Barnstable*, 181 U. S. 464, 467, 468; *The China*, 7 Wall. 53, 68; *Homer Ramsdell* v. *Compagnie Générale Trans.* 182 U. S. 406, 413, 414.

Liability *in rem* may be wholly unrelated to liability *in personam*. Although the United States is not subject to suit its property may be liable *in rem* for its share of a general average sacrifice of a private vessel where execution of the process does not interfere with the Government's possession. *United States* v. *Wilder*, 3 Sumner, 308; approved in *United States* v. *Cornell*, 202 U. S. 190. So also of the liability of government property *in rem* for salvage, although no suit would lie against the sovereign *in personam*. *The Davis*, 10 Wall. 15, 22. See also *The Siren*, 7 Wall. 152, 162; *Workman* v. *The Mayor*, 179 U. S. 552, 568; *The Arturo*, 6 Fed. Rep. 308.

The damages sustained by the New York Central car float should be made good to the extent of three-sixths by the Matthews, one-sixth by the Moran and one-sixth each by scows

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15 D and 18 D. *The Northern Belle*, 9 Wall. 526, 528, 529; *The Keokuk*, 9 Wall. 517, 519.

Mr. Harrington Putnam, with whom *Mr. Charles C. Burlingham* was on the brief, for claimant of the tug Moran:

There is in England no authority for a division in thirds, and in this country the decisions to that effect do not appear to have been carefully considered. Marsden on Collisions (5th ed.), 125. The following cases discussed: *The Peshtigo*, 25 Fed. Rep. 488; *The Brothers*, 2 Biss. 104; *The Maling*, 110 Fed. Rep. 227; *The Lyndhurst*, 92 Fed. Rep. 681; *Scow No. 6 H*, 108 Fed. Rep. 429; *The Nettie L. Tice*, 110 Fed. Rep. 461.

The rule of the admiralty as to the apportionment of damages in case of mutual fault is not a rule of absolute justice, but one of practical utility. The only clear working rule is that where a vessel has contributed to a collision by her own fault, her owner cannot recover more than one-half of his damages.

There is nothing necessarily inconsistent between the case of *Sturgis* v. *Boyer*, 24 How. 110, and *The China*, 7 Wall. 53. See *The City of Norwich*, 118 U. S. 468; *Workman* v. *New York City*, 179 U. S. 552; *Tucker* v. *Alexandroff*, 183 U. S. 424; *The Clarita and The Clara*, 23 Wall. 1; *The Alabama*, 92 U. S. 695, 697; *The Max Morris*, 137 U. S. 1.

As to the law in England and in Germany, see *The Englishman and The Australia*, L. R. (1894) Prob. Div. 239; *The Unterweser 12*, tug *Blitz* and S. S. *Envoy*, Entscheidungen des Reichsgerichts in Civilsachen, 14 Feb., 1903, LIV, p. 13. Also in the Hanseatische Gerichtszeitung, 1903, Part I, 285, see Appendix.

Mr. William S. Montgomery, with whom *Mr. George H. Emerson* was on the brief, for claimant of the tug Matthews:

The District Court correctly apportioned the damages to the carfloat equally among the four vessels sued.

In admiralty the number of owners or the number of agents or servants of owners who are involved in a fault contributing to

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a collision should have no effect upon the apportionment of the damages. In actions *in rem* what the admiralty looks to is the *res* and decrees the payment of damages against the offending thing and not against the owner.

Nor does admiralty consider the number or gravity of the faults of each vessel.

The only logical method of apportioning the damages, where the rule of comparative damage does not obtain, is that adopted by the District Court in apportioning the damages to the carfloat—i. e., to apportion the damages among the offending vessels without any consideration whatever being given to ownership or the number of servants or agents of owners. *The W. G. Mason*, 142 Fed. Rep. 913; *The Juniata*, 93 U. S. 340; *The China*, 7 Wall. 53, and *The Barnstable*, 181 U. S. 464, distinguished from *Sturgis* v. *Boyer*, 24 How. 110.

The correct rule of apportionment is to consider only the offending *res* before the court. If there are three offending *res*, then the damages should be divided into thirds. If there are four offending *res*, then the damages should be divided into fourths; and so on, no matter what may be the number of guilty *res*.

This, of course, may work an apparent hardship if more than one of the offending *res* belongs to the same owner; but then that owner has had more than one offending thing which has contributed to the damage, and the damage might have been less, or might not have happened at all, had not *each of his vessels* been guilty of fault.

The moment any consideration of ownership or of a common or similar fault is allowed to enter into the apportionment of the damages, infinite difficulties will arise. Hughes on Admiralty (1st ed.), 277; *The North Star*, 106 U. S. 17.

In this case there were four offending *res* before the court—the two scows, and the two tugs. The scows because neither of them had lights; the Moran because she did not see that the scows had lights, and also in other respects; and the Matthews because she kept on at full speed after the Moran did not an-

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swer her signal. Had any one of them not been in fault, the collision might not have happened.

All having contributed, and all the offending *res* having been before the court, the District Judge divided the damages in the only logical and sensible way. *The Brothers*, 2 Biss. 104; *The Peshtigo*, 25 Fed. Rep. 488; *The Doris Eckhoff*, 41 Fed. Rep. 156; *The Lyndhurst*, 92 Fed. Rep. 681; *The Nettie L. Tice*, 110 Fed. Rep. 461; *The Maling*, 110 Fed. Rep. 227; *The S. A. McCaulley*, 116 Fed. Rep. 107.

The damages in the second case were also correctly apportioned.

In the second case the Henry Dubois Sons Company, owner of the scow 15 D, sued the tugs Matthews and Moran for the damages sustained by that scow. The parties before the court were then the Henry Dubois Sons Company, libellant, and the tugs Matthews and Moran.

The scow 18 D was not brought in by petition, but it clearly appeared from the proof that that scow was owned by the Henry Dubois Sons Company.

The District Judge, having found all four vessels at fault, directed that the libellant recover one-half of its damages, the recovery to be borne equally by each of the tugs.

This division was correct. *The Mariska*, 107 Fed. Rep. 989; *Erie Railroad Co.* v. *Erie Transp. Co.*, 204 U. S. 220.

MR. JUSTICE HOLMES delivered the opinion of the court.

These cases come here on certificates setting forth in nearly the same terms the facts of a collision. They both are proceedings *in rem*. In the first the New York Central and Hudson River Railway Company, as owners of a car-float that was damaged, libels the steam tug Charles D. Matthews, the steam tug Eugene F. Moran, and the scows 15 D and 18 D. In the second, the Henry Dubois Sons Company, as owner of the two scows, libels the two steam tugs. The statement of facts, slightly abridged, is as follows: At about half past seven, in the evening of February 1, 1905, the railroad company's car-float was pro-

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ceeding up the Hudson River in tow of the tug Matthews, the navigation of the two being conducted solely by the master of the tug. They met the tug Moran, which was towing two mud scows down the river, scow 15 D, immediately behind the Moran, on a hawser, and behind 15 D scow 18 D on another hawser. A collision took place between the car-float and 15 D. Neither 15 D nor 18 D had the required lights. There was an employé of the owner in charge of each scow, and it was their duty as well as the duty of the master of the Moran to have the lights put up. The Moran was guilty of other faults also, so that the tug and the scows all three wrongfully contributed to the damage done to the float. The tug Matthews also was to blame, but the car-float was not, unless, contrary to *Sturgis* v. *Boyer*, 24 How. 110, answerable for the faults of the Matthews, which her owner had hired to move her from place to place in the harbor. The cases in the District Court are reported in 143 Fed. Rep. 187; in the Circuit Court of Appeals, in 154 Fed. Rep. 41, and 83 C. C. A. 153.

The question certified in the first case is, "In what proportion shall the damages sustained by the car-float be assessed upon the offending vessels?" In the second the same question is put concerning the damages sustained by the libellant, the owner of the two scows. In the latter case neither the car-float nor the scow 18 D are made parties or brought in. The District Judge divided the liability for damages to the float equally among the four vessels in fault, and on the same principle charged one-quarter of the damage suffered by scow 15 D to that scow and one-quarter to each of the other three, thus leaving the libellant to bear one-half and dividing the other half between the two tugs. Counsel for the two tugs agree that this result was right, although it is argued for the Moran that the true ground for it in the second case is the rule that when a vessel has contributed to a collision by her own fault her owner cannot recover more than one-half of the damages.

For the Henry Dubois Sons Company, which as owner of the two scows was required to pay one-half the total amount due

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to the float, it is contended that the court should look to the owners after they have appeared, and should divide the damages on the ordinary principles of personal liability into thirds, or else regard the Moran and the two scows as one vessel, jointly liable for one-half, each owner to bear a quarter as between themselves. There is a faint suggestion that in the last apportionment regard might be had to the degree of fault.

The New York Central Railroad gets all its damages in any view, unless *Sturgis* v. *Boyer*, 24 How. 110, should be overruled. In that case it was held that a tug having control of a vessel in tow was solely responsible to a lighter upset by the vessel through the fault of the tug alone. (For the opinion of Judge Betts below see note to *The Express*, 46 Fed. Rep. 864.) We see no reason why the decision should not stand. No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible on principles of agency or otherwise, is carried further here than in England. *The China*, 7 Wall. 53; *The Barnstable*, 181 U. S. 464, 467, 468; *Homer-Ramsdell Transportation Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406, 413, 414. See *The Blackheath*, 195 U. S. 361, 366. Possibly the survival of the fiction has been helped by the convenient security that it furnishes, just as no doubt the responsibility of a master for a servant's torts, that he has done his best to prevent, has been helped by the feeling that it was desirable to have some one who was able to pay. See *Williamson* v. *Price*, 4 Martin, N. S. 399, 401; *Williams* v. *Jones*, 3 H. & C. 256, 263. But after all a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. There is a practical line and a difference in degree between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached. See *The Clarita and The Clara*, 23 Wall. 1; *The Alabama and The Gamecock*, 92 U. S. 695, 697; *The Atlas*, 93 U. S. 302, 318.

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The fact that the vessels composing each flotilla were bound together is not sufficient ground for treating each flotilla as a unit. This follows pretty closely from the considerations that we have urged. If the attachment of the car-float to the Matthews did not make the car-float responsible to 15 D, or affect the extent or principles of its recovery for damage to itself, there seems to be no reason why a similar attachment should affect the distribution of liability among the vessels that were in fault. Their faults were several. The failure of one scow to show a light was distinct in fact and as a cause from the failure of the others to do the same thing, and from the faults of navigation of the Moran. In this case, at least, the attachment ought to have no more effect in diminishing liability for the guilty than in creating it for those free from blame. See *The Express*, 44 Fed. Rep. 392; *S. C.*, 46 Rep. Fed. 860; *S. C.*, 52 Fed. Rep. 89; *Lyndhurst*, 92 Fed. Rep. 681; *Maling*, 110 Fed. Rep. 227; *S. C., S. A. McCaulley*, 116 Fed. Rep. 107; *Nettie L. Tice*, 110 Fed. Rep. 461.

On the other hand, although not to be regarded as a unit simply because they were tied together, the offenders severally are subject to a lien by the established principles of the proceeding *in rem*. It is said, truly enough, that if each scow has to pay a quarter, the amount with which the owners will be charged will be greater than in a personal suit where the owners all are solvent and pay each his share. But without invoking on the other side the characteristic vicissitudes of personal suits in tort, we may say that there is no injustice. Although even the admiralty does not attempt to go far in the quantification of damages, it is not an unreasonable supposition that on an average the owner of two vessels, each concurring in a wrongful result, will contribute twice as much toward producing it as if he had owned only one. If the second scow had been owned by another it would have had to pay its share. It is contrary to the theory of these proceedings to allow ownership to affect the case. We are of opinion that the District Court was right in dividing the damages equally among the guilty vessels

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in the first suit. There is nothing stated sufficient to reopen the question, if there is one, as to changing the apportionment when there are different degrees of blame. *The Atlas*, 93 U. S. 302; *The Max Morris*, 137 U. S. 1. The fact that 18 D is not a party to the second suit does not matter, so far as the question of partially exonerating those before the court is concerned.

We have discussed the question on the assumptions upon which it is presented, but there is one point that seems to us to deserve further consideration from the Circuit Court of Appeals. The only fault on the part of 18 D, that is set out in the statement, is the absence of a light, and it is said that "therefore" it was party to a common fault. We doubt whether the conclusion follows from the premises. When a duty is imposed for the purpose of preventing a certain consequence, a breach of it that does not lead to that consequence does not make a defendant liable for the tort of a third person merely because the observance of the duty might have prevented that tort. See *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Ward* v. *Hobbs*, 4 App. Cas. 13, 33. The question arises, therefore, whether the duty to give warning by a light was imposed upon 18 D for any other purpose than to prevent collision with itself. If not, then as the boats are dealt with as individuals and not as parts of a single whole, we do not see how the absence of a light on 18 D can be said to have contributed to the loss. Pilot Rule 11, under the act of June 7, 1897, c. 4, § 2, 30 Stat. 96, 102, requiring the light, is quoted in *The Komuk*, 120 Fed. Rep. 841, 842. A duty of wider scope has been thought to exist in a somewhat different case. *The Lyndhurst*, 92 Fed. Rep. 681, 682.

On the second question also, subject to the doubt just suggested, it appears to us that the course of the District Judge was right in principle as well as in result. As observed in *The Maling*, 110 Fed. Rep. 227, the quantum of liability ought not to be affected by the position of the party concerned as co-defendant or plaintiff, and the rule of equal division among the guilty vessels has prevailed, in some cases, at least, as well when one of them was the libellant as when they were all on the same side.

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The Brothers, 2 Biss. 104. See *S. C.*, on appeal, Fed. Cas. No. 9322; *Peshtigo*, 25 Fed. Rep. 488.

We answer the question in the first case, No. 87: Equally.

We answer the question in the second case: Equally, the offending vessel or vessels of the libellant bearing their proportion of the loss.

BAGLEY v. GENERAL FIRE EXTINGUISHER COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 96. Argued January 27, 1909.—Decided February 23, 1909.

While the judgment of the Circuit Court of Appeals is not final under act of March 3, 1891, c. 517, 26 Stat. 826, 828, where diverse citizenship exists, if the application of the Constitution of the United States is also invoked in the complaint, *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, the judgment is final if the constitutional right is raised for the first time on the trial.

In a suit where the jurisdiction of the Circuit Court is based on diversity of citizenship a recital in the petition that a judgment was rendered in another State does not amount to asserting the constitutional right that full faith and credit be given thereto so as to deprive the judgment of the Circuit Court of Appeals of its finality.

The full faith and credit clause of the Constitution does not give any force to a judgment against a stranger; and a decision that a defendant is not estopped by a judgment by reason of notice given to him to defend does not amount, even if wrong, to a refusal to give effect to the judgment within the meaning of the full faith and credit clause of the Constitution.

Writ of error to review 150 Fed. Rep. 284, dismissed.

THE facts are stated in the opinion.

Mr. Henry B. Closson for plaintiff in error.

Mr. Peter B. Olney for defendant in error.

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MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for damage caused by the melting on a hot day of fusible sprinkler heads in an automatic sprinkler put up in the plaintiff's building by the defendant for protection against fire. The complaint alleges diversity of citizenship, negligence on the part of the defendant, injury to goods of two tenants in the building, suits by or in the right of the tenants against the plaintiff, which the plaintiff notified the defendant to defend, the recovery of judgments, one of which was affirmed by the Supreme Court of Michigan, *Peerless Manufacturing Co.* v. *Bagley*, 126 Michigan, 225, and payment of the same by the plaintiff, who seeks to recover the sums paid, interest, and the costs of defense. The answer denies many of the material allegations, and relies upon the terms of the written contract under which the work was done, alleging the same to have been performed and the work accepted. The contract required the material to be first class, and all work specified to be done in a thorough and workmanlike manner, and in conformity with the Improved Risks Commission standard for automatic sprinkler installations. It also contained this clause: "It is explicitly understood and agreed that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party." The case was sent to a referee, and he found that the obligations of the agreement were fulfilled, that contrary to rulings asked by the plaintiff the Michigan judgment did not determine that the defendant was negligent, or bind it, and that the defendant was entitled to judgment. Upon the referee's findings the complaint was dismissed on the merits by the Circuit Court, and the judgment was affirmed by the Circuit Court of Appeals. 150 Fed. Rep. 284.

The first question that arises is whether this court has jurisdiction, and upon that we are of opinion that the plaintiff's argument fails. When the jurisdiction below depends entirely upon diversity of citizenship, the judgment of the Circuit Court

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of Appeals is final, by the express terms of the Act of March 3, 1891, c. 517, § 6. 26 Stat. 826, 828. This, of course, is not denied, but it is said that this section does not exclude a resort to this court when the complaint also invokes the application of the Constitution of the United States. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397. It is urged that if an exception is made to the universality of the words when the constitutional question is disclosed in the complaint, it is unreasonable not to extend it sufficiently to include cases where the same question is raised at the trial, as it was in the present instance, and where the matter might have been brought at once from the Circuit Court to this court. *Loeb* v. *Trustees of Columbia Township*, 179 U. S. 472. But the difference is plain. When the constitutional right is claimed in the complaint, the jurisdiction does not depend entirely upon diversity of citizenship, and the exception is not read into the words, but is expressed by the act. When the question is raised at the trial for the first time the case cannot be taken up from the Circuit Court of Appeals without a direct disregard of the words. The difference is pointed out in both of the cases to which we have referred. *Walsh* v. *Columbus &c. Railroad Co.*, 176 U. S. 479; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 409, 410. See also *Huguley Manufacturing Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 295; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277, 282.

Failing the foregoing argument, it is contended that the jurisdiction of the Circuit Court did not depend entirely on the diverse citizenship of the parties. In other words, it is contended that the complaint sufficiently invoked Art. IV, § 1, of the Constitution, by alleging the Michigan judgment, and the fact that in those cases it was averred and adjudged that one of the sprinkler heads was negligently and improperly made of such material as to fuse at too low a temperature, and that the sprinkler and pipes were negligently and improperly erected and placed. But in the complaint there is no intimation, direct or indirect, of a reliance upon the Constitution. On the con-

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trary, instead of simply setting forth the defendant's contract, the suits, notice to the defendant to defend, and the judgments, and thus at least implying that for some reason those judgments were supposed to establish the defendant's liability, it is most elaborately alleged, seemingly as issuable matter, that the defendant was negligent in its work and did not do what it had agreed to perform. The judgments seem on the face of the complaint to be referred to primarily, if not solely, as fixing the amount of the plaintiff's claim. See further *Provident Savings Life Assurance Co.* v. *Ford*, 114 U. S. 635; *Pope* v. *Louisville, New Albany & Chicago Ry. Co.*, 173 U. S. 573, 580.

But if the plaintiff had set forth in so many words that he came into court relying upon full faith and credit being given to the Michigan judgment under the Constitution, still, on the face of the complaint, it would have been obvious that the Constitution was not the basis of his claim, as it is obvious, on reading the opinion of the Circuit Court of Appeals, that full faith and credit to the Michigan judgment has not been denied. The defendant was no party to that judgment, and there is nothing in the Constitution to give it any force as against strangers. If the judgment binds the defendant it is not by its own operation, even with the Constitution behind it, but by an estoppel arising out of the defendant's contract with the plaintiff and the notice to defend. The ground of decision in both courts below was that there was no such estoppel, the duty and responsibility of the defendant being limited by the words that we have quoted from the contract, excluding any obligation other than those set forth. The decision, in other words, turned wholly on the construction of the contract as excluding a liability over in the event that happened. Even if wrong, it did not deny the Michigan judgments their full effect, but denied the preliminary relation between the defendant and the party to them, without which the defendant remained a stranger to them, in spite of the notice to defend.

Writ of error dismissed.

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NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 57. Argued December 14, 15, 16, 1908.—Decided February 23, 1909.

Congress can impute to a corporation the commission of certain criminal offenses and subject it to criminal prosecution therefor.

In actions for tort a corporation may be held responsible for damages for the acts of its agent within the scope of his employment, *Lake Shore & Michigan Southern R. R.* v. *Prentice*, 147 U. S. 101, even if done wantonly, recklessly or against the express orders of the principal.

A corporation is responsible for acts not within its agent's powers strictly construed but assumed to be done by him when employing authorized powers, and in such a case no written authority under seal is necessary. *Washington Gas Light Co.* v. *Lansden*, 172 U. S. 534.

The act of an agent exercising the authority of a corporation which is a common carrier to make rates for transportation may be controlled, in the interest of public policy, by imputing his act to the carrier itself and imposing penalties therefor upon the carrier.

While corporations cannot commit some crimes, they can commit crimes which consist in purposely doing things prohibited by statute, and in such case they can be charged with knowledge of acts of their agents who act within the authority conferred upon them.

Congress has power to so regulate interstate commerce as to secure equal rights to all engaged therein, and the act of February 19, 1903, c. 708, 32 Stat. 847, known as the Elkins act, is not unconstitutional because it imputes to the corporation, and makes it criminally responsible for, acts violative of the Interstate Commerce act done by its agent.

The court will recognize that the greater part of interstate commerce is conducted by corporations, and it will not relieve them from punishment because at one time there was a doctrine that corporations could not commit crimes.

Even if a statute relating both to individuals and corporations deprived an individual of the presumption of innocence and made him responsible for the acts of another, the question of the constitutionality of such statute on that ground cannot be raised by a corporation; and where, as in the case of the Elkins act, there is no doubt that

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Congress would have enacted the statute as to corporations, even if it could not as to individuals; it is valid as to corporations. *Berea College* v. *Kentucky*, 211 U. S. 45.

Every statute is to be construed so as to maintain its constitutionality if possible.

The purpose of the Elkins act being to make the act of the agent the act of the corporation, and to include both within its restrictions, there is no misjoinder in including both the agent and the corporation in one indictment.

An indictment is sufficient if it specifically states the elements of the offense charged with sufficient particularity to fully advise the defendant thereof and so as to be pleaded in bar of any subsequent prosecution for the same offense. § 1025, Rev. Stat.

Under the Interstate Commerce act where a shipper pays the legal rate on numerous shipments and at intervals receives a rebate from the carrier there is a separate and complete offense on each payment and not one continuous offense, although all the payments were made under one agreement.

Quære, and not decided, what constitute separate offenses where numerous shipments are made and paid for at less than the published rates.

An instruction which simply amounts to permitting the jury to consider circumstances connected with the non-appearance of a witness and the non-production of books *held*, in this case, not to have been prejudicial error.

THE facts are stated in the opinion.

Mr. Austen G. Fox and *Mr. John D. Lindsay*, with whom *Mr. Albert H. Harris* was on the brief, for plaintiff in error:

Congress cannot under the Constitution impute to plaintiff in error the commission of a criminal offense and subject it to criminal prosecution and punishment by reason of the matters set forth in the indictment. To take the money of a corporation for crime committed by the individuals who control it, is to take the property of every stockholder. It amounts to punishing the innocent for the guilty. *State* v. *Great Works Mill Co.*, 20 Maine, 41; 2 Jurid. Soc. Papers, 31.

If correctly interpreted by the court below, the fourth clause of § 1 of the Elkins act declaring that the act, omission or fail-

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ure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall be deemed to be the act of such carrier, as well as of that person, is unconstitutional. If misinterpreted by the court below the case was submitted to the jury upon a fundamentally erroneous theory. This applies in terms to any carrier engaged in interstate commerce, and, as construed by the court below, extends the principle of *respondeat superior* to criminal law, destroys the presumption of innocence as to all interstate carriers, and erects in its place a conclusive presumption of guilt against the carrier, based upon any unlawful act of any agent, although in excess of his actual authority.

The trial court admitted that a statute of this nature would probably be invalid in the case of individual carriers, but held it constitutional in the case of corporate carriers. This ruling disregarded the principle that a statute which is unconstitutional in part is unconstitutional as a whole, if the valid and invalid parts of the statute are inseparable. This court has refused to supply qualifications which the legislature has failed to express. *United States* v. *Fox*, 95 U. S. 670; *Employers' Liability Cases*, 207 U. S. 463. In the present case there is, of course, no possibility of such a severance. Moreover, even if the act had been directed against corporations alone, the presumption of innocence shields a corporation to the same extent that it shields an individual. *Inter. Com. Com.* v. *C. G. W. Ry.*, 209 U. S. 108, 119. Equal protection of the laws as well as due process of law is assured to corporations and individuals alike. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150. The rulings of the trial court involved the absolute denial of these rights. The conclusion follows that if the language of the statute compelled the rulings, the statute is unconstitutional, and, if the statute did not warrant the rulings, then the judgment should be reversed for the erroneous construction of the statute. Clark & Marshall, Law of Crimes (2d ed.), § 194 (i), p. 267; *Morse* v. *State*, 6 Connecticut, 9; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Peck* v. *Heurich*, 167 U. S. 624, 629.

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The presumption of innocence prevails alike whether the defendant in a criminal prosecution be a corporation or an individual. *Int. Com. Com.* v. *C. G. W. Ry. Co.*, 209 U. S. 108, 119.

One is not liable, *criminaliter*, for the act of his agent, even though the act be done in the course, or even within the general scope, of his lawful employment, in the sense in which we use that phrase in applying, *civiliter*, the doctrine of *respondeat superior*. The presumption of innocence excludes such a criminal responsibility. *Queen* v. *Holbrook*, L. R. 3 Q. B. D. 60, 63; *Reg.* v. *Ramsay*, 48 Law T. Rep. N. S. 733, 744; *People* v. *McLaughlin*, 150 N. Y. 365, 391; *United States* v. *Halberstadt*, Gilp. 262, 270; *Parsons* v. *Armor*, 3 Pet. 428; *McDonald* v. *Hearst*, 95 Fed. Rep. 656, 658, 660; *United States* v. *Gooding*, 12 Wheat. 460, 469; *Wynehamer* v. *People*, 13 N. Y. 378; *Interstate Com. Com.* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108; *Cummings* v. *Missouri*, 4 Wall. 277, 328; *Davis* v. *United States*, 160 U. S. 469; *State* v. *Devine*, 98 N. Car. 778; *Sullivan* v. *County of Oneida*, 61 Illinois, 242, 249; *State* v. *B. & O. R. R. Co.*, 15 W. Va. 362, 387; *Satterfield* v. *W. U. Tel. Co.*, 23 Ill. App. 446; *Commonwealth* v. *Putnam*, 4 Gray, 16; *Stockwell* v. *United States*, 13 Wall. 531; *Schreiber* v. *Sharpless*, 6 Fed. Rep. 175.

The Elkins act as construed below undertakes to determine a question that belongs to the courts.

Whether facts upon which rights depend are true or false is an inquiry for the courts to make, under legal forms. It belongs to the judicial department of the Government. *Birdsong* v. *Brooks*, 7 Georgia, 88, 92, cited in 2 Wigmore, Evid., § 1353, n. 2; *Ziegler* v. *S. & N. Ala. R. R. Co.*, 58 Alabama, 594; *Hoke* v. *Henderson*, 4 Dev. Law, 1, 15; *Bielenberg* v. *Montana U. Ry. Co.*, 8 Montana, 271, 277.

This clause of the Elkins act would not have been valid if limited to corporations, and this court may not read into the act an exception of a class constitutionally exempted so as to save what remains. *Gulf, Col. & S. F. Ry. Co.* v. *Ellis*, 150 U. S.

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150; *Seaboard Air Line* v. *Seegers*, 207 U. S. 73, 77; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, 108; *Boyd* v. *United States*, 116 U. S. 616, 635.

Classification based upon the dangerous character of the business is constitutional, but classification based merely on the character of the employer is not. *L. & N. R. R. Co.* v. *R. R. Comm. of Tenn.*, 19 Fed. Rep. 679; *Bedford Quarries* v. *Bough*, 168 Indiana, 671; *Ballard* v. *Oil Co.*, 81 Mississippi, 507; *Niagara Ins. Co.* v. *Cornell*, 110 Fed. Rep. 816, 825; *Duncan* v. *Missouri*, 152 U. S. 377; *Barbier* v. *Connolly Pipe Co.*, 113 U. S. 27, 31; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 337.

If it can be lawfully done, the duty of the courts is to construe the statute so as to render it constitutional, but this may be done only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. The court will not attempt to save a statute by making it "only partial in its operation." *Employers' Liability Cases*, 207 U. S. 497. See also *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Harris*, 106 U. S. 629; *United States* v. *Ju Toy*, 198 U. S. 253, 262; *Baldwin* v. *Franks*, 120 U. S. 678, 685, 690; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304; *Trade-Mark Cases*, 100 U. S. 82; *Allen* v. *Louisiana*, 103 U. S. 142; *Sprague* v. *Thompson*, 118 U. S. 90; *Pollock* v. *Farmers' L. & T. Co.*, 158 U. S. 636.

The indictment is bad for the misjoinder as defendants of the plaintiff in error and its agents. Archbold's Cr. Pl. (22d ed.) 78; Wharton, Cr. Pl. & Pr. (9th ed.) 307; Nathaniel Lindley, 2 Jurid. Soc. Papers, 31; Morawetz, Priv. Corp., §§ 732-733; *People* v. *Clark*, 8 N. Y. C. R. 179, 215.

If the Elkins act permits the joinder under consideration, it is to that extent unconstitutional. *United States* v. *McKee*, 4 Dillon, 128; *Goffey* v. *United States*, 116 U. S. 436, 445; *United States* v. *One Distillery*, 43 Fed. Rep. 846; *S. C.*, 174 U. S. 149, 152; *United States* v. *Olsen*, 57 Fed. Rep. 579, 586.

The demurrer should have been sustained and the motions

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to quash and in arrest of judgment granted, because of the substantial and structural defects of the indictment.

The acts described and set forth in the indictment do not constitute a crime, since it is not averred that by reason of the giving of the alleged rebates, any advantage was given or discrimination practiced. *Gridley* v. *Northwestern Life Ins. Co.*, 14 Blatch. 107; *United States* v. *Wiltberger*, 5 Wheat. 574, 576; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Interstate Comm.* v. *Ala. Mid. Ry.*, 168 U. S. 144, 166.

Nor does the indictment charge any other violation, either of the Elkins act, or the Interstate Commerce act.

The allegations of the indictment, and of each of the counts, are so ambiguous and indefinite as to make it uncertain what is the exact offense or offenses intended to be charged.

The facts set forth in the indictment and established by the evidence constituted but a single criminal transaction, and but a single penalty should have been imposed. *In re Snow*, 120 U. S. 275; *In re Nielson*, 131 U. S. 176; *Regina* v. *Firth*, L. R. I. C. C. 72; *S. C.*, 11 Cox, C. C. 234.

The principle underlying the rule which forbids the recovery for aggregated penalties under a penal statute unless the language of the statute clearly requires it, is peculiarly applicable to strictly criminal prosecutions. *State* v. *Cooper*, 13 N. J. L. 361; *State* v. *Commissioners*, 2 Murphy (N. C.), 371.

The Elkins act, so far from authorizing the splitting up of the transaction upon which the indictment is based into separate offenses, impliedly forbids it. *United States* v. *B. & A. R. Co.*, 15 Fed. Rep. 209; *United States* v. *St. L. & S. F. R. Co.*, 107 Fed. Rep. 870.

Mr. Henry L. Stimson, United States Attorney, with whom *The Attorney General* and *Mr. Assistant Attorney General Ellis* were on the brief, for defendant in error:

Congress has power, in the exercise of its constitutional function of regulating commerce, to enact laws which subject corporations to criminal prosecution and punishment. *Berea*

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College v. *Commonwealth*, 211 U. S. 45; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Swift & Co.* v. *United States*, 209 U. S. 56; *C., B. & Q. Ry. Co.* v. *United States*, 209 U. S. 90; *Great Northern Railway Co.* v. *United States*, 208 U. S. 452; *Eastern Dredging Co.* v. *United States* and *Bay State Dredging Co.* v. *United States*, 206 U. S. 246; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Hackfeld & Co.* v. *United States*, 197 U. S. 442; *State* v. *Morris Ry. Co.*, 23 N. J. Law, 360 (creating a nuisance in erecting and building a public highway); *State* v. *Passaic Co. Society*, 54 N. J. Law, 260 (keeping a disorderly house); *United States* v. *Kelso*, 86 Fed. Rep. 304 (violation of Eight-Hour Law); *United States* v. *Alaska Packers' Association*, 1 Alaska, 217 (taking salmon unlawfully); *The State* v. *The B. & O. R. R. Co.*, 15 W. Va. 362 (Sabbath breaking); *Commonwealth* v. *Pulaski Association*, 92 Kentucky, 197 (permitting gaming on its fair grounds); *State* v. *Atchison*, 3 Lea (Tenn.), 729 (criminal libel); *State* v. *Nat. Bank*, 2 S. Dak. 568 (taking usurious rates of interest); *United States* v. *Van Schaick*, 134 Fed. Rep. 592, 602 (homicide, occasioned by an inadequate supply of life preservers); *United States* v. *McAndrews & Forbes Co.*, 149 Fed. Rep. 836 (violating Sherman Anti-Trust Law against conspiracy in restraint of trade); *United States* v. *New York Herald Co.*, 159 Fed. Rep. 296 (sending obscene matter through the mail).

The case at bar involves the constitutionality of the last paragraph of § 1 of the Elkins Law only in so far as it applies to corporate carriers. *Berea College* v. *Commonwealth*, 211 U. S. 45.

As a matter of fact, this paragraph of the Elkins Law does not apply to individual carriers. See Report of Interstate Com. Comm'n of January 17, 1902, also 6th Ann. Rep. Int. Com. Com. (1892) 39; 7th Ann. Rep. Int. Com. Com. (1893) 78; 9th Ann. Rep. Int. Com. Com. (1895) 23; 10th Ann. Rep. Int. Com. Com. (1896) 115.

In any event, the first paragraph of the Elkins Law which contains similar provisions, and provisions upon which the

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judge's rulings could be sustained, is expressly limited to "corporation common carriers."

The so-called clause 4, § 1 of the Elkins act which declares that in construing and enforcing the provisions of that section, "the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person," is not only constitutional but is merely the statutory enactment of a rule of law already applied by this court in establishing liability of a corporation for the willful wrong of its agents. *Field* v. *Barber Asphalt Pav. Co.*, 194 U. S. 618, 621; *Atchison Co.* v. *Matthews*, 174 U. S. 96, 104; *Dow* v. *Beidelman*, 125 U. S. 680; *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245 (sustaining a tax statute which treated as a separate class all railroad corporate property for purposes of taxation); see also *Metropolitan Street Railway Co.* v. *New York*, 199 U. S. 1, 47; *Lake Shore & Michigan Southern Railway Co.* v. *Prentice*, 147 U. S. 101, 109–111; see also *Denver & Rio Grande Railway* v. *Harris*, 122 U. S. 597; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 85; see also *Eastern Dredging Co.* v. *United States*, 206 U. S. 246, 257.

The defendants were properly joined in the indictment, and the Elkins Law permitting such joinder is constitutional. *United States* v. *McGinnis*, 26 Fed. Cas. No. 15,678; *State* v. *Lehman*, 182 Missouri, 424 (with full collection of authorities); 22 Cyc. 373; *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. Rep. 823, 832, 833; *State* v. *Atchison*, 3 Lea (Tenn.), 729; *Banner Pub. Co.* v. *State*, 16 Lea, 176; *People* v. *Detroit White Lead Works*, 82 Michigan, 471; *Overland Cotton Mill* v. *People*, 32 Colorado, 263; Thompson on Corporations, § 4495; *Hale* v. *Henkel*, 201 U. S. 43.

The whole argument of the plaintiff in error is based upon doctrines which have been entirely outgrown by the development of the modern corporation and have long been obsolete. *Salt Lake City* v. *Hollister*, 118 U. S. 256, 259; see also *Good-*

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speed v. *The East Haddon Bank*, 22 Connecticut, 530, 536; *Philadelphia &c. R. R. Co.* v. *Quigley*, 21 Howard, 202.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York, sued out by the New York Central and Hudson River Railroad Company, plaintiff in error. In the Circuit Court the railroad company and Fred L. Pomeroy, its assistant traffic manager, were convicted for the payment of rebates to the American Sugar Refining Company and others, upon shipments of sugar from the city of New York to the city of Detroit, Michigan. The indictment was upon seven counts and was returned against the company, its general traffic manager and its assistant traffic manager. The first count, covering the offering of a rebate, was withdrawn from the jury by the district attorney, and it is unnecessary to consider it. The second count charges the making and publishing of a through tariff rate upon sugar by certain railroad companies, including the plaintiff in error, fixing the rate at twenty-three cents per 100 pounds from New York city to Detroit, and charges the railroad company's general traffic manager and assistant traffic manager with entering into an unlawful agreement and arrangement with the shippers, the American Sugar Refining Company of New York and the American Sugar Refining Company of New Jersey, and the consignees of the sugar, W. H. Edgar & Son, of Detroit, whereby it was agreed that for sugar shipped over the line, the full tariff rate being paid thereon, the railroad company should give a rebate of five cents for each 100 pounds. This count charges that during the months of April and May, 1904, shipments were made under this agreement and the regular tariff rates paid thereon. On July 14 of that year a claim for a rebate in the sum of $1,524.99 was presented by the agents of the shipper and consignees and paid on the thirty-first day of August to Lowell M. Palmer, agent of the sugar company, for the benefit of the shippers and

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consignees. In each of the counts, except the sixth, the lawful rate is charged to have been 23 cents per 100 pounds. During the month of June, 1904, the same was reduced to 21 cents per 100 pounds, and the rebate agreed to and paid being 3 cents per 100 pounds. The second count covers the shipments of April and May, 1904; the third count, the shipments for July and August, 1904; the fourth for September, 1904; the fifth for October, 1904; the sixth for June, 1904, and the seventh for April and May, 1904. In each of these counts there is an allegation of the payment of the published rate, the presentation of the claim for the rebate, and the statement of a specific sum allowed and paid on account thereof.

Upon the trial there was a conviction upon all of the six counts, two to seven inclusive. The assistant traffic manager was sentenced to pay a fine of $1,000 upon each of the counts; the present plaintiff in error to pay a fine of $18,000 on each count, making a fine of $108,000 in all.

The facts are practically undisputed. They are mainly established by stipulation, or by letters passing between the traffic managers and the agent of the sugar refining companies. It was shown that the established, filed and published rate between New York and Detroit was 23 cents per 100 pounds on sugar, except during the month of June, 1904, when it was 21 cents per 100 pounds.

The sugar refining companies were engaged in selling and shipping their products in Brooklyn and Jersey City, and W. H. Edgar & Son were engaged in business in Detroit, Michigan, where they were dealers in sugar. By letters between Palmer, in charge of the traffic of the sugar refining companies and of procuring rates for the shipment of sugar, and the general and assistant traffic managers of the railroad company, it was agreed that Edgar & Son should receive a rate of 18 cents per 100 pounds from New York to Detroit. It is unnecessary to quote from these letters, from which it is abundantly established that this concession was given to Edgar & Son to prevent them from resorting to transportation by the water route between New

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York and Detroit, thereby depriving the roads interested of the business, and to assist Edgar & Son in meeting the severe competition with other shippers and dealers. The shipments were made accordingly and claims of rebate made on the basis of a reduction of five cents a hundred pounds from the published rates. These claims were sent to the assistant freight traffic manager of the railroad company by Palmer, the agent of the sugar companies, and then sent to one Wilson, the general manager of the New York Central and Fast Freight Lines of Buffalo, New York. Wilson returned to the assistant traffic manager of the railroad company a cashier's draft for the amount of the claim. This draft was then sent to the agent of the sugar companies and his receipt taken. It was stipulated that these drafts were ultimately paid from the funds of the railroad company.

Numerous objections and exceptions were taken at every stage of the trial to the validity of the indictment and the proceedings thereunder. The principal attack in this court is upon the constitutional validity of certain features of the Elkins act. 32 Stat. 847. That act, among other things, provides:

"(1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed.

* * * * * * * *

"In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed

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to be the act, omission or failure of such carrier, as well as of that person."

It is contended that these provisions of the law are unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged. The argument is that to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law. And it is further contended that these provisions of the statute deprive the corporation of the presumption of innocence, a presumption which is part of due process in criminal prosecutions. It is urged that as there is no authority shown by the board of directors or the stockholders for the criminal acts of the agents of the company, in contracting for and giving rebates, they could not be lawfully charged against the corporation. As no action of the board of directors could legally authorize a crime, and as indeed the stockholders could not do so, the arguments come to this: that owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case.

Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief Justice Holt (*Anonymous*, 12 Modern, 559) that "a corporation is not indictable, although the particular members of it are." In Blackstone's Commentaries, chapter 18, § 12, we find it stated: "A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may in their distinct individual capacities." The modern authority, universally, so far as we know, is the other way. In considering the subject, Bishop's New Criminal Law, § 417, devotes a chapter to the capacity of corporations to commit crime, and states the law to be: "Since a corporation acts by its officers and agents their purposes, motives, and intent are just as much those of the corporation as are the

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things done. If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously." Without citing the state cases holding the same view, we may note *Telegram Newspaper Company* v. *Commonwealth*, 172 Massachusetts, 294, in which it was held that a corporation was subject to punishment for criminal contempt, and the court, speaking by Mr. Chief Justice Field, said: "We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong." It is held in England that corporations may be criminally prosecuted for acts of misfeasance as well as nonfeasance. *Queen* v. *Great North of England Railway Company*, 9 Queen's Bench, 315.

It is now well established that in actions for tort the corporation may be held responsible for damages for the acts of its agent within the scope of his employment. *Lake Shore & Michigan Southern R. R.* v. *Prentice*, 147 U. S. 101, 109, 111.

And this is the rule when the act is done by the agent in the course of his employment, although done wantonly or recklessly or against the express orders of the principal. In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct. *Lothrop* v. *Adams*, 133 Massachusetts, 471.

A corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the

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agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act. *Washington Gaslight Co.* v. *Lansden*, 172 U. S. 534, 544.

In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him. It was admitted by the defendant at the trial that at the time mentioned in the indictment the general freight traffic manager and the assistant freight traffic manager were authorized to establish rates at which freight should be carried over the line of the New York Central and Hudson River Company, and were authorized to unite with other companies in the establishing, filing and publishing of through rates, including the through rate or rates between New York and Detroit referred to in the indictment. Thus the subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company, whose acts in this connection are sought to be charged upon the company. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and

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charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. 2 Morawetz on Corporations, § 733; Green's Brice on Ultra Vires, 366. If it were not so, many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy.

It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions enured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt influential in bringing about the enactment of the Elkins Law, making corporations criminally liable.

This statute does not embrace things impossible to be done by a corporation; its objects are to prevent favoritism, and to secure equal rights to all in interstate transportation, and one legal rate, to be published and posted and accessible to all alike. *New Haven Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 399; *Armour Packing Co.* v. *United States*, 209 U. S. 56.

We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to

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give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

There can be no question of the power of Congress to regulate interstate commerce, to prevent favoritism and to secure equal rights to all engaged in interstate trade. It would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises.

It is contended that the Elkins Law is unconstitutional, in that it applies to individual carriers as well as those of a corporate character, and attributes the act of the agent to all common carriers, thereby making the crime of one person that of another, thus depriving the latter of due process of law and of the presumption of innocence which the law raises in his favor. This contention rests upon the last paragraph of § 1 of the Elkins Act, which is as follows, 32 Stat. 847:

"In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person."

We think the answer to this proposition is obvious; the plaintiff in error is a corporation, and the provision as to its responsibility for acts of its agents is specifically stated in the first paragraph of the section. There is no individual in this case complaining of the unconstitutionality of the act, if objectionable on that ground, and the case does not come within that class of cases in which unconstitutional provisions are so interblended with valid ones that the whole act must fall, notwithstanding its constitutionality is challenged by one who might be legally brought within its provisions. *Employers' Liability Cases*, 207 U. S. 463. It may be doubted whether there

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are any individual carriers engaged in interstate commerce, and every act is to be construed so as to maintain its constitutionality if possible. There can be no question that Congress would have applied these provisions to corporation carriers, whether individuals were included or not. In this view the act is valid as to corporations. *Berea College* v. *Kentucky*, 211 U. S. 45, 55.

It is contended that the court should have sustained the objection to the indictment upon the ground that the corporation and its agents could not be legally joined therein, but we think a fair construction of the act permits both the corporation and the agent to be joined in one indictment for the commission of the offense. The purpose of the act was to make the act one of the corporation as well as of the agent, and to include both within the prohibitions and restrictions of the statute, and this seems to be the accepted practice. Thompson on Corporations, § 4495.

Objections were made as to the sufficiency of the indictment based upon its want of particularity in describing the offense intended to be charged. Section 1025 of the Revised Statutes of the United States provides that no judgment upon an indictment shall be affected by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant, and, unless the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the manner in which the offense was committed, there can be no reversal. *Connors* v. *United States*, 158 U. S. 408, 411; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 84. An examination of the indictment shows that it specifically states the elements of the offense with sufficient particularity to fully advise the defendant of the crime charged and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense.

It is insisted that if any criminal offense was committed at all it was a single and continuing one against the railroad company, because of the agreement evidenced by the letters which

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preceded the transportation, and under the terms of which the shipments were made. We cannot agree to this contention. The statute makes it an offense to give or receive a rebate whereby goods are transported in interstate commerce at less than the published rate; in the present case the jury found the railroad company guilty of rebating as charged. We are not dealing with a case where there was an agreement to carry the goods in the first place at a concession from the established rate, and wherein the railroad company never received the full legal rate. In this case, upon each of the numerous shipments, the full legal rate was paid, and upon claims being presented at short intervals the amount of the stipulated rebate was remitted by check to the shipper. We think the offense was complete when the railroad company thus paid the stipulated rebate to the shipper.

It is further contended that the court below erred in its reference to the absence of the witness Embleton, and the non-production of books in which entries were made concerning the transactions in question. It appears that Embleton was a clerk in the employ of Wilson, and had charge of the books in which these transactions were entered, that he did not appear at the trial, having left because of sickness, nor were the books produced. The comment objected to was made in connection with this paragraph of the charge:

"On this question of intent also, gentlemen, it is competent for you to take into consideration the method in which these transactions were carried on. The letter from Palmer to Guilford was headed private and confidential. It will be proper for you to take into consideration the fact, if you believe the evidence in the case, that the method of making these payments, instead of being by a direct check drawn at Buffalo by or on behalf of this defendant, was by purchasing a draft drawn by the Bank of Buffalo upon the Chemical Bank in favor of Mr. Palmer; and you may take into consideration upon that question the evidence in this case that the original claims presented by Palmer to Pomeroy and sent by Pomeroy to Wilson

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have been destroyed; and the fact that when Embleton, the man in charge of the shipments, left the employment there a book containing entries in reference to these claims disappeared, and that Mr. Wilson testified in this case that he did not know where it was.

"Now it is for you to say, gentlemen, whether these occurrences and these facts are consistent with innocence or with guilt, because if a man carries on an act, or any person does anything which upon its face is apparently unlawful, and he does it in a furtive and secret manner, showing that his intention while he does the act is to do it in such a way as to conceal it, the jury may draw the inference from that fact, if they see fit—they are not obliged to, but they may if they see fit—that the intention with which the act was done was to perform an illegal or a criminal act."

We do not perceive any prejudicial error in this charge. It simply amounted to permitting the jury to consider the circumstances enumerated as bearing upon the guilty purposes of the parties charged in the indictment. It left to the jury to attach such weight as they saw fit to the circumstances of Embleton's absence and the non-production of the books. It is to be noted in this connection that the judge, in the latter portion of his charge, at the request of the defendant, said: "There is no evidence that the defendant corporation or those who controlled its corporate action destroyed or failed to produce upon the trial any paper for which the Government has asked."

We have noted all the assignments of error which involve questions of a substantial character.

We find no error in the proceedings of the Circuit Court, and its judgment is

Affirmed.

MR. JUSTICE MOODY took no part in this case.

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NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY *v.* UNITED STATES (NO. 2).

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 69. Argued December 14, 15, 16, 1908.—Decided February 23, 1909.

New York Central R. R. Co. v. *United States, ante*, p. 481, followed as to constitutionality of the Elkins act of February 19, 1903, c. 708, 32 Stat. 847, and as to when offenses of giving rebates in violation of the Interstate Commerce act are complete.

The Elkins act applies to rebates paid after it went into effect although paid in pursuance of an agreement, and on shipments, made prior to that date, the agreement being illegal when made.

An indictment which definitely sets forth the elements of the offense of which it was intended to charge the accused is sufficient; and in this court only substantial defects in the indictment are available to reverse a judgment of conviction. *Connors* v. *United States*, 158 U. S. 408.

THE facts are stated in the opinion.

Mr. Austen G. Fox and *Mr. John D. Lindsay*, with whom *Mr. Albert H. Harris* was on the brief, for plaintiff in error.

Mr. Henry L. Stimson, with whom *The Attorney General* and *Mr. Assistant Attorney General Ellis* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case was argued and submitted with No. 57, just decided. In the Circuit Court of the United States for the Southern District of New York the plaintiff in error was convicted by the verdict of a jury, and sentenced under the Elkins act, 32 Stat. 847, to pay a fine of $18,000. The indictment consisted of two counts. The first charges the establishment and

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publication of the tariff rate upon sugar over the line of the plaintiff in error and other railroads, from the city of New York to the city of Cleveland, Ohio, at the rate of 21 cents per hundred pounds; that on November 20, 1902, the railroad company entered into an unlawful agreement with the shipper, the American Sugar Refining Company, whereby its sugar should be shipped over said lines, and the lawful tariff being paid thereon the railroad company would give a rebate to the shipper of 6 cents for each hundred pounds of sugar transported to Cleveland, Ohio, for reconsignment to points beyond, and a rebate of 4 cents for each one hundred pounds transported to Cleveland for local delivery. The agreement further stipulated that the shipper should present its claim for rebate under the agreement aforesaid, and the same should be paid by the railroad company, thereby reducing the published tariff by 6 cents, or 4 cents for each hundred pounds of sugar, according to the destination thereof. The carriage of sugar under the arrangement was charged, payment of the published tariff rates, and the presentation of claims for rebates is also alleged, and it is charged that on April 3, 1903, the railroad company paid to the American Sugar Refining Company $26,141.81 by way of rebate in respect of the transportation of sugar under the agreement.

The second count is substantially the same as the first, except the allegation of the preliminary arrangement to pay the rebates is omitted. The record discloses that the plaintiff in error and other railroad companies, during the time covered in the indictment, had established and were operating a fast freight line from the city of New York to the city of Cleveland; that the published rate for the transportation of sugar over said route from New York to Cleveland was 21 cents per hundred pounds; that Nathan Guilford and Fred L. Pomeroy, the general freight traffic manager and the assistant freight traffic manager, respectively, of the defendant were authorized to establish rates at which freight was to be carried, and to unite with other companies in establishing, filing and publishing a list

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of through rates. The record also discloses that the American Sugar Refining Company was a New Jersey corporation engaged in refining sugar in Brooklyn and Jersey City; that it made large shipments to Cleveland as well as to other parts of the country; that the sales department of the company, which routed the sugar sold to different parts of the country and transported over different railroads, acted according to instructions received from one Lowell M. Palmer, who was in charge of the handling of the railroad business of the company, and furnished the sales department with freight rates and arrangement of routes for the shipments. It also appears that on the twenty-fourth day of July, 1902, with an assistant named Riley, Palmer met Pomeroy at his office, and a memorandum was thereupon made evidencing an agreement between the parties as follows:

"*Memorandum made July* 24, 1902.

"Present—

"Mr. L. M. Palmer, Mr. T. P. Riley, Mr. F. L. Pomeroy.

"Sugar shipments to Cleveland and beyond:

"1st. Shipments to be billed from New York regular tariff rate 21 cents per 100 pounds.

"2d. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements 4½ cents per 100 pounds.

"3d. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned under the arrangement to the American Sugar Refining Company, Merwin Street, Cleveland.

"4th. The New York Central to make reclamation against Mr. L. M. Palmer for a refund of 1½ cents per 100 pounds, account lighterage allowed him in regular billing. This amount to be handed to the New York Central by Mr. L. M. Palmer in cash.

"5th. Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on such shipments of sugar to Cleveland as are covered by the first clause of this memorandum on the basis of 6 cents per 100 pounds.

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"6th. This arrangement to apply to all sugar billed to Merwin Street Warehouse, whether delivered locally in Cleveland or reconsigned beyond Cleveland. The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return for submission to him as to his understanding of the arrangement. In any event the difference in the rate between sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds."

Afterwards, by an exchange of letters between Palmer and Guilford, 4 cents a hundred pounds was fixed as the rebate to be allowed on sugars delivered in the city of Cleveland, and 6 cents upon shipments reconsigned beyond the city of Cleveland. Between July 24, 1902, and December 6, 1902, the American Sugar Refining Company shipped a large amount of sugar from New York to Cleveland, paying thereon the full tariff rate of 21 cents per one hundred pounds. Thereafter claims were made up under the direction of Palmer against the New York Central and Hudson River Railroad Company, purporting to be for overcharges, and which were made upon the basis agreed upon in the memorandum aforesaid, and no evidence was introduced in the case showing that these rebates had any legitimate ground to rest upon. These claims were allowed and paid as hereinafter stated.

Objections as to the constitutionality of the Elkins act were made in this case, and as they are disposed of in the opinion announced in No. 57, just decided, the conclusions therein stated need not be repeated. The point principally urged for a reversal of the judgment in this case turns upon the construction of the Elkins act, having reference to the fact that the property concerning which the agreement for a rebate was made was transported prior to the taking effect of the Elkins act, February 19, 1903. In this case the agreement was made July 24, 1902, and the goods were actually transported before the act went into effect. The payment of the rebate was made on April 2, 1903, after the act went into effect. As we have

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already had occasion to hold in No. 57, *ante*, where the legal tariff rate was, in fact, paid by the shipper to the carrier, the rebating was not complete until the money was actually refunded. The legal and published rate was the one which the carrier was obliged to pay, and no arrangement for any different rate could have been enforced at any time against the carrier. *Texas & Pacific Railway Co.* v. *Mugg*, 202 U. S. 242; *Gulf Railroad Co.* v. *Hefley*, 158 U. S. 98.

Before considering the terms of the Elkins act it is to be noted that the arrangement for the rebate was an illegal act, for which the agents of the carrier might have been criminally punished in accordance with the terms of the Interstate Commerce act then in force. Sections 6 and 10, 25 Stat. 855. The Elkins act amended the former law by providing punishment in criminal proceedings against the corporation as well as its agents for the offense of making illegal rebates from the published tariff rates. There was then no vested right in the shipper or the carrier to have the illegal agreement consummated by the payment of the rebate arranged for. In this attitude and with the purpose of making the law more effectual it was amended by the Elkins act so as to bring corporations within the provisions of the law and to make offenses under it punishable by criminal proceedings against corporations.

The Elkins act provides:

"And it shall be unlawful for any person, persons, or corporations to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commence by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carriers as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination practiced." C. 708, 32 Stat. 847.

It is the contention of the plaintiff in error that the language

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of this statute addresses itself to the future, and it asks the application of the well-known rule that statutes are presumed to be prospective in their operation, and contends that this act has no reference to property transported in interstate commerce at less than the published rates at any time before the act went into effect. Reading the latter part of the sentence, "whereby any such property shall by any device whatever be transported at a less rate," etc., the act would seem to have reference to future transportations only. But in an earlier part of the same sentence it has been provided that it shall be unlawful to offer, grant, or give, to solicit, accept or receive any rebate in respect to property in interstate commerce, transportation "whereby any such property shall be transported at a less rate than that named in the tariffs," etc. Taking the sentence altogether it is apparent that its purpose is to punish the giving of a rebate, in respect of transportation of property in interstate commerce, which shall have the effect to give or receive such transportation at less than the published rates.

Manifestly the act does not refer alone to the transportation of the property, although that is an essential element of the offense, but the thing aimed at is the giving or receiving of a rebate whereby the property shall be transported at less than the rates named in the published tariffs. It is the transaction of giving or receiving the rebate, etc., with the effect that the goods of the shipper thus preferred shall be transported at a reduction from the published rates, which is penalized.

As we have had occasion to say in No. 57, *ante*, the giving of the rebate is complete and the offense committed when a part of the legal rate already paid has been refunded. The word *shall* refers to the happening of the event—the giving of the illegal rebate—and was not introduced into the statute for the purpose of making future transportation illegal. No new legislation was required to make transportation under such an agreement illegal. The object of the statute was to punish rebates given or received after the passage of the act in respect of prop-

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erty, the subject of interstate transportation, and to make the carrier corporation criminally liable therefor.

We think that the Circuit Court was right in holding that this section of the law applied to the rebate paid in April, 1903, after the taking effect of the Elkins act.

Objections were taken to the indictment, but we think that it sets forth with sufficient definiteness the elements of the offense of which it was intended to charge the plaintiff in error. At this stage of the proceedings only substantial defects in the indictment are available to reverse the judgment of conviction. *Connors* v. *United States*, 158 U. S. 408, 411.

Error is alleged to have been committed in what the court said to the jury upon their return into court after the charge. The record upon this subject is as follows:

"The court thereupon charged the jury further as follows:

"Gentlemen, I have received this paper from the foreman of the jury: 'Does the payment of rebate after the passage of the Elkins act on shipments made before the passage of the act constitute a crime under the law?'

"To that I reply that it does, provided the payment was made with a criminal intent. That criminal intent does not mean with any wicked intent. The payment of rebates is not morally a crime. It was made a misdemeanor by statutes, and if a corporation or officer of a corporation pays a rebate with an intent thereby to make the payment in violation of the provisions of the statute prohibiting it, he does it with a criminal intent.

"There are three provisions in this act under either one of which, if you find that the evidence supports the charge, you may convict. If you find upon the evidence in this case that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the defendant guilty.

"Under another provision of this act if you find that this

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defendant has been guilty of a wilful failure to strictly observe the tariff filed specifying the rates for the transportation of sugar, you may find them guilty. Or, if you find that this corporation has offered, granted or given any rebate concession or discrimination upon the property transported in this case, 'whereby any such property shall by any device whatever be transported at a less rate than is fixed in the schedule,' you may find the defendant guilty, provided in each of these cases you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law. You may retire, gentlemen.

"Mr. LINDSAY: I would like to call your honor's attention to the fact that you instructed the jury they might find the defendant guilty if they 'offered.' There is no charge in this indictment of offering.

"The COURT: I did not say offer, I think.

"Mr. LINDSAY: Your honor used the word offer.

"The COURT: I withdraw that expression if I used it. I did not intend to use it.

"Mr. LINDSAY: I also ask your honor in this connection to charge as this indictment is framed under the Elkins law they cannot convict the defendant upon this indictment for anything which transpired before the going into effect of the Elkins act.

"The COURT: Undoubtedly the payment of the rebate must have taken place after the passage of the act. The fact that the property was transported before the passage of the act does not bar a conviction in this case."

It is contended that the effect of this charge was to permit the defendant to be convicted of violating the act of 1887 as amended in 1889, 25 Stat. 855, while the charge in the indictment, framed under the Elkins act, was intended to reach an offense committed after it went into effect, and to cover the unlawful rebate alleged to have been paid in April, 1903, after the taking effect of that act. But we think this part of the record should be read in connection with the charge of the court to the jury, in which the court gave a history of the previous

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act to regulate commerce, under § 6 of which it is provided, that "it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the commission in force at the time," and referred in that connection to the amendatory character of the Elkins act and the provisions thereof making the act, omission or failure of the officer, agent, etc., within the scope of his employment, the act, omission or failure of the carrier as well as such person. This part of the charge was apparently by way of introduction to the charge covering the specific requirements of the Elkins act. The judge in his charge summarized and commented upon the facts proved or admitted in the case, and in concluding said:

"Now, gentlemen, no evidence has been offered on behalf of the defendant in the case, and I understand from the argument of counsel that the defendant's defense in the case is the denial of any criminal intent. Gentlemen, intent is essential to the establishment of any charge of crime. Of course there may be legitimate overcharges; there may be repayments for money paid to a railroad company that are perfectly innocent and proper. Very frequently it occurs that some error or mistake or claim of injury arises when goods are being shipped, and that sort of thing gives rise to reclamation and claims of that sort, and the question for you to decide in this case is what was the intent with which that check for $26,000 and odd was paid? Was it paid as a pure rebate as described in this Elkins act and in the Interstate Commerce act, or was it paid for some legitimate and proper overcharge or cause? That is the simple question in this case for you to determine, and that question I leave for you to pass upon on the consideration of all the evidence in the case."

This charge, taken in connection with what occurred when the jury returned, and the colloquy which followed between

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court and counsel, does not, we think, leave in doubt that the court submitted to the jury as a basis of conviction only the acts which occurred after the passage of the Elkins act. The acts amounting to a violation of that law were specifically charged in the indictment and admitted or proved at the trial.

The charge, taken together, submitted the question of the intent of the defendant to do, through the acts of its agents authorized by it, the things denounced in the statute. The charge was as favorable as the plaintiff in error was entitled to, and we find no substantial error in the proceedings.

Judgment affirmed.

MR. JUSTICE MOODY took no part in the decision of the case.

UNITED STATES v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 285. Argued December 16, 1908.—Decided February 23, 1909.

Under the Elkins Law of February 19, 1903, c. 708, 32 Stat. 847, a carrier can be prosecuted for the offense of rebating where it is a party to a joint rate although it has not filed or published the same.

While criminal statutes are not to be enlarged by construction, and a crime must be clearly defined in its terms, they are to be reasonably construed with a view to effecting the purpose of their enactment.

THE facts are stated in the opinion.

Mr. Henry L. Stimson, with whom *Mr. Assistant Attorney General Ellis* was on the brief, for plaintiff in error:

The very method of rebating herein charged was prevalent prior to 1903; was called to the attention of Congress by the

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Interstate Commerce Commission; provisions were inserted into the Elkins Law for the avowed purpose of stopping the practice, and the enactment of these provisions constitutes a construction of the law to the effect that it covers the precise offense here charged. *Cin., N. O. & T. P. Ry. Co.* v. *Int. Comm. Comn.*, 162 U. S. 184, 192, 193; Ann. Rep. Int. Comm. Comn. 1894, p. 32; Ann. Rep. Int. Comm. Comn. 1898, p. 7; First Ann. Rep. Int. Comm. Comn. pp. 134, 135, 136; *United States* v. *Hanley*, 71 Fed. Rep. 672; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72; *Int. Comm. Comm.* v. *Reichman*, 145 Fed. Rep. 235, 240.

The provisions of the first section of the Elkins Law expressly cover and make criminal the transactions set out in this indictment, and other independent clauses of that act, not noticed by the court below, also penalize the offense. *Int. Comm. Comm.* v. *Reichman*, 145 Fed. Rep. 235; Holmes' Common Law, p. 134; *Williams* v. *United States*, 168 U. S. 382; *Wechsler* v. *United States*, 158 Fed. Rep. 579.

The Government's view of the construction of this law is in accord with that expressed by this court in the *Cisco Oil Mill case*, and has been supported by all reported opinions of lower courts, while the view of the court below, if carried to its logical conclusion, would produce results expressly condemned by this court in the *Cisco case*, and necessarily contrary to its decisions in the *Armour* and *Burlington* cases.

The ultimate question to be determined is whether the defendant has established and put in force the tariff from which it is alleged to have departed. By participating in a joint rate a carrier establishes that tariff as to its own lines, just as it would establish it by filing or publishing it. The participation, the filing, and the publishing are merely different ways in which the ultimate fact of the establishment of the rate can be shown as against a carrier, and no one of them is intended by the law to be made the sole condition precedent to the establishment of the tariff rate. *Texas & Pacific Ry.* v. *Cisco Oil Mill*, 204 U. S. 449, 451; see also *Cochran* v. *United States*, 157 U. S. 286,

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290. The precise question raised by this demurrer has been repeatedly decided by the courts against the contention of the defendants. *United States* v. *Wood*, 145 Fed. Rep. 405, 409; *Camden Iron Works* v. *United States*, 158 Fed. Rep. 561; *C., B. & Q. R. R. Co.* v. *United States*, 209 U. S. 90; *Armour Packing Co.* v. *United States*, 209 U. S. 56.

Mr. Austen G. Fox, with whom *Mr. John D. Lindsay* and *Mr. Albert H. Harris* were on the brief, for defendant in error:

Even though it were true that the method of rebating charged by this indictment was prevalent prior to 1903, was reported to Congress by the Interstate Commerce Commission and that provisions were inserted in the Elkins act for the avowed purpose of stopping the practice, the failure of the framer of the statute to effect this purpose cannot be overcome by any judicial addition to its language. Broom's Legal Maxims, 56; *Hobbs* v. *McLean*, 117 U. S. 567, 579; *United States* v. *Goldenberg*, 168 U. S. 95, 102; *Swift* v. *Luce*, 27 Maine, 285; *Gardner* v. *Collins*, 2 Pet. 58; *Rex* v. *Barham*, 8 B. & C. 99; *Hadden* v. *Collector*, 5 Wall. 107, 111, 112; *United States* v. *Trans-Missouri Freight Association*, 290 U. S. 318; *Alldridge* v. *Williams*, 3 How. 9; *Soon Hing* v. *Crowley*, 113 U. S. 703.

The provisions of the first section of the Elkins act do not, expressly or upon any fair construction of its language, cover or make criminal the transaction set out in the indictment.

Within the meaning of the statute a rebate is a different thing from a concession or discrimination, precisely as the same differ from each other. Certainly the payment of a rebate is neither an omission to file or to observe a tariff. The theory that although it was drawn "with special reference to the rebate clause" the indictment can be supported upon any other provision is therefore quite unsound.

The transaction is not covered by the "rebate clause of the Elkins act." *Interstate Comm. Comm.* v. *Reichman*, 145 Fed. Rep. 235, discussed and distinguished. See *United States* v. *Palmer*, 3 Wheat. 610; *Smith* v. *Townsend*, 148 U. S. 490. To

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sustain the contention of the Government would be to read into the statute the words "whether it had filed that rate or not, and whether carried by another carrier or by itself."

A statute which creates a new liability, unknown to the common law, is to be strictly construed, and is not to be extended beyond the clear import of its terms. *Nor. Pac. Ry. Co.* v. *Whalen*, 149 U. S. 157.

There can be no constructive offense; if there be any fair doubt whether the statute embraces the case of the accused, it must be resolved in favor of the accused. *United States* v. *Clayton*, 2 Dill. 219; *United States* v. *Biggs*, 157 Fed. Rep. 264, 270.

This rule applies particularly to statutes which create crimes. *United States* v. *Whittier*, 5 Dill. 35, 39; see also *Bolles* v. *Outing Co.*, 175 U. S. 262; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Morris*, 14 Pet. 694; *United States* v. *Clayton*, 2 Dill. 226; *United States* v. *Reese*, 5 Dill. 413; *United States* v. *Wiltberg*, 5 Wheat. 76, 95; Maxwell, Inter. of Stat. (4th ed.), p. 397; *London Council* v. *Aylesbury* (1898), 1 Q. B. 106.

MR. JUSTICE DAY delivered the opinion of the court.

This proceeding is here under the act of March 2, 1907, c. 2564, 34 Stat. 1246, permitting the Government to bring to this court a case where the court below sustains a demurrer to the indictment, in which the judgment involves the construction of a Federal statute upon which the indictment is founded.[1] The indictment to which the demurrer was sustained in this case charges that the Missouri Pacific Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company, the Lake Shore and Michigan Southern Railway Company and the New York Central and Hudson River Railroad Company established a joint tariff of rates, fares and charges which was filed with the Interstate Commerce Commission by the Missouri Pacific Railway Company, in which the rate set forth and en-

[1] For the statute in full see 211 U. S. 398.

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forced from Poplar Bluff, Missouri, to New York upon cooperage materials was 35 cents for each 100 pounds. It is then charged that in January, 1898, the defendant's traffic manager, Nathan Guilford, and Lowell M. Palmer, president of and agent for the Brooklyn Cooperage Company, entered into an unlawful agreement and arrangement for the shipping of cooperage material over the through line and route aforesaid from Poplar Bluff, Missouri, to New York City, providing that for the said transportation the Brooklyn Cooperage Company should pay to the aforesaid common carriers the lawful published rates and charges; that thereafter the defendant, the New York Central and Hudson River Railroad Company, should pay to the said Palmer, as agent for the cooperage company, the sum of 5½ cents for each 100 pounds of said cooperage material so transported, thereby reducing the lawful tariff in that amount, with the result that such cooperage material should and would be transported at a less rate than that named in the published tariffs. The indictment then charged a delivery to the Missouri Pacific Railroad Company at Poplar Bluff for shipment to New York of cooperage material, which was accordingly shipped to New York by the connecting carriers aforesaid, and over the continuous line and route so established. The indictment charges the payment of certain sums by the defendant to Palmer for the benefit of the cooperage company for rebates and concessions in respect to the carriage of said cooperage material. Different counts in the indictment cover specifically different payments.

The effect of these transactions is charged to be that the defendant did thereby unlawfully and willfully give a rebate and concession in violation of the act to regulate commerce, whereby the property was transported by said corporation at a less rate than that named in the tariffs aforesaid, published and filed by such common carrier, as required by said act to regulate commerce and the acts amendatory thereof and supplemental thereto.

We need not repeat the discussion had as to the objections

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to the Elkins act, 32 Stat. 847, which were considered in Nos. 57 and 69, *ante*. The court below sustained the demurrer upon the ground that the defendant company, the New York Central and Hudson River Railroad Company, is not averred to have filed with the Interstate Commerce Commission the through rate at which the transportation was had, but, as charged in the indictment, the same was filed by the initial common carrier, the Missouri Pacific Company. 157 Fed. Rep. 293. The question then is, Can a carrier be prosecuted under the Elkins act for the offense charged in this indictment where it is a party to a joint rate but has not filed and published the same? The charge in the indictment is not for the failure of the New York Central and Hudson River Railroad Company to publish the joint tariff, if it were required to do so by the act, but is for the giving of a rebate or concession, and it is contended that the first section of the Elkins act makes it unlawful to give or receive any rebate, etc., "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs *published and filed by such carrier* as is required by said act to regulate commerce and acts amendatory thereto, or whereby any other advantage is given or discrimination practiced." The argument is that inasmuch as the tariff was filed and published by the Missouri Pacific Company and not by the defendant railroad company, it could not be prosecuted for the offense alleged in the indictment. By § 6 of the act of March 2, 1889, c. 382, 25 Stat. 855, it is required, concerning the filing of tariffs:

"And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission."

It is said to have been the practice that such joint tariffs should be filed by the initial carrier. In any event, it was contended and was held by the Circuit Court that inasmuch as the

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Elkins act referred only to the tariffs "published and filed by such carrier," and the rebates in this case had been given by a carrier who did not publish and file the rate, the latter company did not come within the terms of the act. We find, however, that § 1 of the Elkins act, in which the language quoted is used, also contains the following language (32 Stat. 847):

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act."

The learned judge of the Circuit Court treated this provision as one relating to evidence, and not as establishing a substantive offense. But we think this is giving too narrow a construction to the terms of the statute and fails to give effect to the language used. We recognize the rule which is laid down in the cases cited by counsel for the defendant in error, that criminal statutes are not to be enlarged by construction, and that a crime must be clearly defined in the terms of the act before it can be held to be embraced within its provisions. But while this is true, criminal statutes, like other acts of legislation, are to receive a reasonable construction, with a view to effecting the purpose of their enactment, and we think it entirely clear that the concluding part of § 1 of the Elkins act which we have above quoted brings all of the carriers who have participated in any rate filed or published within the terms of the act, as much so as if the tariff had been actually published and filed by such participating carrier. For the statute specifically provides that the published rate shall be conclusively deemed in any prosecution under the act to be the legal rate as against the carrier who files the same, or "participates in any rates so filed and published;" and the section further provides that any

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departure from such rate, which would include rates either published or participated in, shall be deemed to be an offense under the act. This part of the first section of the Elkins act was evidently enacted with a view to meeting the very situation developed in this case, wherein a joint rate has been established binding upon all who are parties thereto, and has been filed by one of the participating carriers.

We think the learned judge was in error in holding that offenses of the character charged in this indictment could be prosecuted only as against the carrier actually filing and publishing the joint rate. The judgment of the Circuit Court is

Reversed.

MR. JUSTICE MOODY took no part in the decision of this case.

MULLAN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 82. Argued January 20, 1909.—Decided February 23, 1909.

A commissioned officer in the Navy can waive the provisions of art. 60 of § 1624, Rev. Stat., and allow proceedings of a court of inquiry to be evidence on a court-martial the sentence of which may extend to his dismissal; *Schick* v. *United States*, 195 U. S. 65; and, where, at the request of such an officer, the Secretary of the Navy convenes a court-martial to try him on matter which had already been the subject of a court of inquiry, on condition that the proceedings of such court of inquiry be evidence, each party having the privilege, however, of introducing other evidence, the accused is not deprived of any substantial right so that the sentence of the court-martial is invalidated.

Reduction by the President of the United States of the dismissal of an officer of the Navy from the service to reduction to one-half sea pay for five years is a mitigation of the sentence within the meaning of art. 54 of § 1624, Rev. Stat. *Quære*, whether art. 54 of § 1624 applies to the action of the President.

Civil courts are not courts of error to review sentences of legally or-

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ganized courts-martial having jurisdiction of the person of the accused and of the offense.

42 Ct. Cl. 157, affirmed.

THE facts are stated in the opinion.

Mr. W. E. Richardson, with whom *Mr. J. H. Ralston* and *Mr. F. L. Siddons* were on the brief, for appellant.

Mr. John Q. Thompson, with whom *Mr. George M. Anderson* was on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This appeal is prosecuted to reverse the judgment of the Court of Claims dismissing the petition of Dennis W. Mullan, appellant. Full findings of facts were made in the Court of Claims, and upon consideration the claim of the petitioner was dismissed. 42 Ct. of Cl. 157. From the findings of fact made by the court it appears that Dennis W. Mullan was a commander, serving as commandant, at the navy yard at Pensacola, where he served from July 30, 1896, till March 7, 1897. Charges having been preferred against him, at his request a court of inquiry was convened to investigate them. The court of inquiry, after a full investigation and trial, reported adversely to the appellant. At that time he was subject to examination for promotion to the grade of captain, and unless he could acquit himself of the charges preferred he would be liable under § 1447 of the Revised Statutes of the United States (act of August 5, 1882, c. 391, 22 Stat. 286) to be discharged from the service without more than one year's pay. In this condition of affairs the appellant made application to the Secretary of the Navy for a court-martial to try him upon the charges to be formulated from the findings of the court of inquiry. Correspondence ensued between the Secretary of the Navy and the appellant, fully set forth in the report of this case in the Court of Claims. 42 Ct. Cl. 159 *et seq.* The Secretary of the Navy, in answer to appellant's request, proposed to call a court-martial

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at Washington for trial upon such charges as the Department might designate, provided the record of the court of inquiry should be admitted as evidence, each party to have the privilege of introducing other evidence. The appellant advised the Secretary that he would agree to such court-martial, it being understood that the privilege of introducing other witnesses should embrace the right to recall witnesses who had previously testified before the court of inquiry, and to take depositions upon written interrogatories. The Secretary of the Navy refused to permit the recalling of witnesses who had testified before the court of inquiry, or to permit testimony to be taken by interrogatories, but permitted the calling of other witnesses. Thereupon the appellant notified the Department that he acceded to the conditions stated in the Secretary's letter. The court-martial was ordered by the Secretary of the Navy to try the appellant upon the charges of drunkenness and drunkenness on duty. The evidence submitted at the court-martial consisted of the records of the court of inquiry, together with one witness called in addition thereto. The court-martial found the appellant guilty of both charges and sentenced him to be dismissed from the Navy; on June 30, 1897, the Secretary of the Navy approved this sentence. The same was submitted to the President, who, on July 8, 1897, made the following order in the premises.

"The sentence in the foregoing case of Commander Dennis W. Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To be reduced in rank, so that his name shall be placed at the foot of the list of commanders in the Navy, and to be suspended from rank and duty, on one-half sea pay, for a period of five years, during which time he shall retain his place at the foot of said list."

The appellant protested against the legality of the proceedings. At the trial before the court-martial no objection was offered by the appellant or his attorneys to the introduction of the evidence. On July 11, 1901, the unexpired period of the sentence was remitted by order of the President. The suit was

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begun in the Court of Claims to recover the difference between "one-half sea pay" and "waiting orders pay," from July 8, 1897, when the President's order was made, as above recited, and July 11, 1901, when the President remitted the unexpired period of the sentence, the amount claimed being the sum of $3,934.14.

It is contended by the appellant that the proceedings of the court-martial are null and void because of the manner in which that court was convened, upon requirement as a condition precedent that the appellant should submit to the introduction of the record of the testimony introduced before the court of inquiry, with the right to call additional witnesses, as hereinbefore stated. This contention is based upon art. 60 of § 1624 of the Revised Statutes, which provides as follows:

"ART. 60. The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony cannot be obtained."

It is contended that inasmuch as this case did not come within the statutory provisions permitting the evidence before a court-martial to be used, as such right is limited to cases not extending to the dismissal of a commissioned or warrant officer, and a capital case, the court-martial was not properly organized, and its proceedings were null and void. It is insisted that this provision of the law is to enable the accused, in cases of this character, to meet his witnesses face to face, and is analogous to the constitutional right in criminal cases; and, being an enactment for the benefit of the service and the protection of those engaged therein, the appellant could not waive its provisions. But we are of opinion that this was a right which he might waive. In *Schick* v. *United States*, 195 U. S. 65, it was held that a party might, in the case then before the court, waive the right to a trial by jury, and in the course of the opinion Mr. Justice Brewer, speaking for the court, said (p. 71):

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"Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right to be confronted with the witnesses against him, and to have the assistance of counsel. Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel, and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional nor statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy."

The Secretary of the Navy was under no legal obligation to call a court-martial to inquire into the charges made against the accused. The court of inquiry was invoked, as was the court-martial, at the instance of the appellant. He had had a full trial before the court of inquiry, in which the record disclosed a large number of witnesses were called; he was represented by counsel; he was present in person; he had a full opportunity to cross-examine the witnesses and to make a defense. At the court-martial he was permitted to introduce additional witnesses, and had the benefit of one witness whose testimony was in his favor. We think there was nothing in the manner in which the court-martial was organized which deprived the accused of a substantial right in such manner as to oust its jurisdiction in the premises. The civil courts are not courts of error to review the proceedings and sentences of courts-martial where they are legally organized and have jurisdiction of the offense and of the person of the accused, and have complied with the statutory requirements governing their proceedings. *Dynes* v. *Hoover*, 20 How. 65; *Ex parte Reed*, 100 U. S. 13; *Swaim* v. *United States*, 165 U. S. 553.

It is contended that the order of July 18, 1897, in which the President undertook to mitigate the sentence of the appellant, dismissal from the Navy, to reduction to one-half sea pay for the period of five years, with reduction in rank and suspension

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as stated, was illegal and unauthorized, because of art. 54, § 1624, of the Revised Statutes of the United States, which provides:

"Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm."

The Court of Claims was of opinion that this section did not apply to the action of the President of the United States. If it be conceded for this purpose that it is applicable to the President (§ 1624, arts. 38 and 53 of the Rev. Stats.), we are of the opinion that the President's action did, in fact, mitigate the previous sentence of the court-martial as approved by the Secretary of the Navy. It may be conceded that there is a technical difference between the commutation of a sentence and the mitigation thereof. The first is a change of a punishment to which a person has been condemned into one less severe, substituting a less for a greater punishment by authority of law. To mitigate a sentence is to reduce or lessen the amount of the penalty or punishment. Bouvier's Law Dictionary, vol. 1, 374; Ib. vol. 2, 428.

When the President otherwise confirmed the sentence of the Navy Department from absolute discharge from the Navy to reduction in rank and duty for the period of five years on one-half sea pay, he did what in terms he undertook to do, and by the lessening of the severe penalty of dismissal from the Navy, approved by the department, reduced and diminished, and therefore mitigated, the sentence which he was authorized to approve and confirm against the appellant, or mitigate in his favor.

Judgment affirmed.

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AMERICAN EXPRESS COMPANY *v.* UNITED STATES.
NATIONAL EXPRESS COMPANY *v.* SAME.
UNITED STATES EXPRESS COMPANY *v.* SAME.
WELLS, FARGO AND COMPANY *v.* SAME.
ADAMS EXPRESS COMPANY *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 405, 406, 407, 408, 409. Argued November 10, 11, 1908.—Decided February 23, 1909.

The purpose of the Elkins act is to require publication of tariff and to prevent and prohibit all discrimination, and the issuing of express franks falls within such prohibition.

Whether or not the issuing of express franks to officers and employés of express companies and their families is prohibited by § 2 of the Interstate Commerce Act of February 4, 1889, c. 104, 24 Stat. 379, an injunction is authorized under § 3 of the Elkins act of February 19, 1903, c. 708, 32 Stat. 846, wherever a common carrier is engaged in the carriage of passengers or freight at less than the published rate, and by the Hepburn act of June 29, 1906, c. 3591, 34 Stat. 584, express companies are brought within the act, and obliged to file and publish their rates.

The power of Congress over interstate transportation embraces all manner of carriage whether gratuitous or otherwise; and, in the absence of express exceptions, the intention of Congress in enacting the Elkins act was to prevent any departure whatever from published rates.

The exceptions contained in the provision in § 1 of the Hepburn act of June 29, 1906, c. 3591, 34 Stat. 584, allowing a common carrier to issue passes for free transportation of passengers to certain classes of persons cannot be extended to give express companies the right to issue passes to the same classes of persons for transportation of merchandise.

While a proviso may sometimes be construed as extending rather than limiting legislation each statute must depend on its own terms, and

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a proviso will be construed consistently with the legislation under consideration.

Where Congress has used plain and explicit language the only province of the courts is to give effect to the act as plainly expressed in its terms, and if the law is defective in not extending to one class of common carriers privileges extended to another, the remedy is in the hands of Congress and not of the courts.

THE facts are stated in the opinion.

Mr. Lawrence Maxwell, with whom *Mr. Lewis Cass Ledyard*, *Mr. Frank H. Platt*, *Mr. Carl A. de Gersdorf*, *Mr. W. W. Green* and *Mr. Charles W. Stockton* were on the brief, for appellant:

The custom of express companies to issue such passes as are herein in question was one of long standing and presumably known to Congress. There is no record of any protest against it to or by the Interstate Commerce Commission, or to Congress, nor any suggestion in any speech or report that it was supposed to be detrimental to the public interest, or that it was intended to be prohibited. There is no direct or express prohibition in the statute. On the contrary, the Interstate Commerce Act recognizes, and always has recognized that the granting of similar privileges to the officers and employés of railroad companies is consistent with sound public policy. See § 22 of the act. And § 1, as amended June 29, 1906, expressly exempts officers and employés of common carriers and their families, from the prohibition against free passenger transportation, and declares that the provision shall not prohibit the interchange of passes for officers, agents and employés of common carriers and their families. The same section declares that the term common carrier shall include express companies.

The reason for making these exemptions in favor of the employés of common carriers, and members of their families, is obvious. *Steamboat New World* v. *King*, 16 How. 469, 473; *Express Cases*, 117 U. S. 1; *B. & O. S. W. Ry. Co.* v. *Voigt*, 176 U. S. 498.

The proviso in § 1 for "the interchange of passes for the offi-

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cers, agents and employés of common carriers, and their families," relates not only to passenger passes, but was evidently used as an introduction to an amendment offered after the bill was reported, for the purpose of extending the privilege of interchanging employés' passes to all common carriers subject to the act. If not it was unnecessary, for § 22 already covered the case of railroad passes for officers and employés.

As to the office of a proviso, see: *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242; *Baggaley* v. *Pittsburg & Lake Superior Iron Co.*, 90 Fed. Rep. 638.

The failure to specifically mention express companies in § 22 does not operate to exclude them from the privilege of carrying the personal packages of their employés free or of exchanging employés' passes with other common carriers. That section is only illustrative and not exclusive. When that section was adopted express companies were not subject to the act and were therefore not named, but when they were brought in by the amendment of June 29, 1906, they came within the spirit and principle of § 22, and also within the spirit and principle of the proviso in § 1, that this provision should not prohibit the interchange of passes for the officers, agents and employés of common carriers, and their families, and within the spirit of the exemption in that section of the employés of railroad companies, and their families, from the prohibition against free passenger transportation. *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, 145 U. S. 263, 278.

The Interstate Commerce Act does not purport to regulate all common carriers nor the carriers that are subject to the act in all of their relations. Section 6 declares that wherever the word "carrier" occurs in this act, it shall be held to mean common carrier. But the service which the express companies perform for the holders of employés' passes is not that of common carrier, because it is gratuitous, and the holder is required to assume all risk of loss or damage from whatever cause, to the

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property carried. Schouler on Bailments (3d ed.), § 343; *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440; *Baltimore & Ohio S. W. Ry. Co.* v. *Voight*, 176 U. S. 498; *Quimby* v. *Boston & Maine R. R.*, 150 Massachusetts, 365.

The free carriage of persons or property may be a cloak for a rebate, or, under certain circumstances, an unlawful discrimination, in violation of the statute. But it is impossible for the Government to maintain that the issuing of employés' passes in good faith by express companies is unjust discrimination or unreasonable advantage, within the prohibition of the statute, in the face of its explicit declarations concerning passes issued by railroad companies to the same class of persons, for the same reasons, and under similar circumstances.

The case of the express companies is not substantially different from that of the railroad companies, for they are engaged in "a sort of partnership relation in carrying on a common carrier business," and the court should not make a distinction between them in the absence of clear and specific language in the statute, especially as the practice which the Circuit Court has enjoined was lawful at common law, is beneficial to the express companies in the conduct of their business, and is not injurious to the public.

The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent. *Durousseau* v. *United States*, 6 Cranch, 307, 314. See also *Paquete Habana*, 175 U. S. 677, 685; *Glover* v. *United States*, 164 U. S. 297; *C., N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 197; *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Co.*, 43 Fed. Rep. 37.

The Attorney General and *The Solicitor General* for the United States:

Transportation under franks by express companies constitutes an unjust discrimination and subjects other shippers

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to an unreasonable prejudice within the meaning of §§ 2 and 3 of the Interstate Commerce Act. The term "under substantially similar circumstances and conditions" in § 2 refers to the circumstances and conditions relating to the carrriage of the goods and not to the person of the sender. *Re Persons Free or at Reduced Rates by B. & M. R. R. Co.*, 5 I. C. C. Rep. 69; *Harvey* v. *Louisville & Nashville R. R. Co.*, 5 I. C. C. Rep. 153. The effect of the Interstate Commerce Act was to prohibit the granting of free transportation except as provided by § 22. *Ex parte Koehler*, 31 Fed. Rep. 315; *Re Charge to Grand Jury*; 66 Fed. Rep. 146.

The portions of §§ 2 and 3 relating to unjust discrimination were modeled from the English tariff act, and in construing them our courts have followed the interpretation of the English courts. *Interstate Comm. Comm.* v. *Baltimore & O. R. R. Co.*, 145 U. S. 263; *I. C. C.* v. *Alabama Midland R. Co.*, 168 U. S. 144; *Texas & Pacific Ry.* v. *I. C. C.*, 162 U. S. 197. Construing similar sections of the English act, the English courts have unanimously held that the differences in circumstances and conditions relate only to the carriage of goods and the nature and character of the service rendered by the shipper. *Gt. Western R. Co.* v. *Sutton*, L. R. & H. L. 226; *Denaby Main Colliery Co.* v. *Manchester Ry. Co.*, 11 App. Cas. 97.

The provisions of the Interstate Commerce Act require absolute and uniform adherence to the published schedule, and when a carrier has once established, published and filed a rate there can be no departure therefrom which has resulted to the extent of granting free transportation to their own officers and employés and to the officers and employés of other carriers in exchange for like favors from those carriers. See § 6, act June 29, 1906; § 1, Elkins act as amended by act June 29, 1906; *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Armour Packing Co.* v. *United States*, 209 U. S. 56.

The only section of the Interstate Commerce Act which relates in terms to the carriage of property at free or reduced

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rates is § 22, 25 Stat. 857, 862, and there is nothing in it which by any possible construction can be taken as covering the granting and interchanging of franks by the express companies charged here. The prohibition of the Elkins act is directed at discriminations and advantages of *every* kind. The original act of 1887 prohibited "unjust" discriminations and "undue" and "unreasonable" prejudices and disadvantages. The change in language in the amendatory legislation shows that Congress was intentionally broadening the scope of the prohibitions against the granting of advantages and discriminations. This is shown by the history of the interstate commerce legislation, and of the times and the evil which the amendatory legislation was intended to remedy. *N. Y., N. H. & H. R. R. Co.* v. *I. C. C.*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 56. In passing the Elkins act Congress undoubtedly had in mind decisions of the courts holding that a criminal prosecution could not be maintained under a statute defining with such uncertainty the offense prohibited,—the original statute being so drawn as to leave for a determination of fact in every case whether or not the discrimination was an unjust one. *C. & N. W. Ry.* v. *Dey*, 35 Fed. Rep. 866; *Tozer* v. *United States*, 52 Fed. Rep. 917; *I. C. C.* v. *B. & O. R. R. Co.*, 145 U. S. 263. When Congress drew the provision requiring adherence to established rates and prohibiting the giving of advantages and discriminations, and omitted the words "undue," "unreasonable" and "unjust," its intention was to make the statute definite and certain and capable of practical enforcement, and to put an end to favoritism and all evasions.

There is no justification of the acts complained of to be found in the anti-pass provision of § 1 of the Hepburn act, 34 Stat. 584. That section relates manifestly to the transportation of persons alone and not to the carriage of goods. The term "frank," applies to the transportation of property, while "pass," applies to the transportation of passengers. The proviso manifestly related only to railroads, and when, later, express companies were included in the law, the proviso remained un-

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changed and escaped attention; but this is not a manifestation of an intention on the part of Congress to extend the pass interchange to franks for the carriage of property beyond the plain meaning and limitation of all the rest of the section. This is a proviso which must be construed as carving something out of the previous enactment and restraining its generality. The exception carved out is an exception from a proviso which is limited to the transportation of passengers and therefore the same limitation must be placed upon the proviso. *United States* v. *Dickson*, 15 Pet. 141; *Savings Bank* v. *United States*, 19 Wall. 227; *Georgia Banking Co.* v. *Smith*, 128 U. S. 174; *White* v. *United States*, 191 U. S. 545.

MR. JUSTICE DAY delivered the opinion of the court.

These cases are appeals from the Circuit Court of the United States for the Northern District of Illinois and were submitted upon oral argument and printed record and briefs in No. 405. They involve the same question and hence will be disposed of together. The petition was filed in the Circuit Court under the third section of the Elkins act, February 19, 1903, c. 708, 32 Stat. 847, providing for the institution of such suit whenever the Interstate Commerce Commission shall have reasonable grounds for believing that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is granting any discrimination forbidden by law.

An injunction was issued restraining the express companies from "issuing any frank or other document for the free transportation of property to the following persons, to wit: the officers, agents, attorneys, and employés of said defendant and their respective families; the officers and employés of other express companies and their respective families; the officers and employés of any railroad or any other common carrier subject to the act to regulate commerce and its amendments, and their respective families; or to any of said persons; and from trans-

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porting and forwarding for said persons above named or any of them, without demanding and receiving the lawful rate of payment therefor, any shipments of property subject to the provisions of said interstate commerce act and its amendments."

The facts are not seriously in dispute and were stipulated at the trial and show that it has been the custom of express companies for many years to issue franks such as are embraced in the injunction. These franks were not issued except to officers and employés of the companies and their families, and to the officers and employés of other express companies and transportation companies and members of their families, in exchange for passes issued by the latter companies to the officers and employés of the express companies. The franks provided that they should not be used for business packages or for transportation of extra heavy weight, money, bonds, jewelry, live stock, or business consignments, and only for the personal packages of the holder of such frank, he being required to assume all risk of loss or damage from whatever cause to property carried under the frank.

The question is, Does the Interstate Commerce law prohibit express companies from giving free transportation of personal packages to their officers and employés and members of their families, and to the officers of other transportation companies and members of their families in exchange for passes issued by the latter to the officers of the express companies? The Circuit Court held the affirmative of this proposition.

It is the contention of the Government that such transportation is forbidden by § 2 of the act of February 4, 1889, c. 104, 24 Stat. 379, forbidding the transportation of property or passengers subject to the provisions of the act for any person for a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, than it charges, demands, collects, or receives from any other person for doing for him the like service, and by § 3 of the same act (24 Stat. 379, 380) which makes it unlawful to give any undue preference or advantage to any particular persons or

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locality, and by the provisions of the Elkins act hereafter quoted.

Without considering whether the case at bar is covered by the sections of the Interstate Commerce act referred to, an injunction is authorized under § 3 of the Elkins act, where a common carrier is engaged in the carriage of passengers or freight at less than the published rate on file, and we shall limit our attention to certain provisions of the Elkins law in this connection. Section 1 of the Elkins act provides (as amended by the Hepburn act, June 29, 1906, c. 3591, 34 Stat. 584, 587):

"The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense.

* * * * * * * *

"It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transmission of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced.

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to

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depart therefrom, shall be deemed to be an offense under this section of this act."

Section six of the Interstate Commerce act, as amended by the same law, provides:

"Nor shall any carrier charge or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the point named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs: *Provided*, That whenever the word 'carrier' occurs in this act it shall be held to mean 'common carrier.'"

The amendment to the Interstate Commerce act by the act of June 29, 1906, c. 3591, 34 Stat. 584, brought express companies within the terms of the act. The express companies were therefore obliged to file and publish their rates for the transportation of property under § 6 of the Interstate Commerce act as amended, and it is admitted in the record that they have done so.

The provisions of the Elkins act to which we have referred have been the subject of consideration in recent cases before this court. *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 71. It is unnecessary to repeat the discussion had in those cases as to the prior legislation and the reasons of public policy which led up to the enactment of the sections of the Elkins act above quoted. It is enough to say that it was the purpose of this law to require the publication and posting of tariff rates, open to public inspection, and at the service of all shippers alike; to prohibit and punish secret departures from the published rates, and to prevent and punish rebating, preferences and all acts of undue discrimina-

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tion. As was said by Mr. Justice White, speaking for the court in *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission, supra:*

"The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

In view of the interpretation thus given to the act we think it cannot be doubted that the transportation of property, such as shown in this case, upon franks issued by the express companies, is within the terms of the act. It permits those who hold these franks to obtain the transportation of such property as is covered thereby without compensation, or, if the transportation has been paid, it is refunded to the shipper upon the presentation of the frank. Within the terms used in the Elkins act, such transportation enables one class of persons to obtain transportation at a different and less rate than that named in the published rates.

It is contended that such transportation is not within the terms of the act, as it was not the purpose of Congress to regulate in these provisions gratuitous transportation, but the purpose was to prevent discriminations, rebating and so forth, where property has been carried by a common carrier for hire; that it is a departure from the rates charged for that class of transportation which is the evil to be remedied, and the only one covered by the terms of the act. But the power of Congress over interstate transportation embraces all manner of carriage of that character—whether gratuitous or otherwise—and, in the absence of express exceptions, we think it was the intention of Congress to prevent a departure from the published rates and schedules in any manner whatsoever. If this be not so, a wide door is opened to favoritism in the carriage of property, in the instances mentioned, free of charge.

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If it is lawful, in view of the provisions of the Interstate Commerce act, to issue franks of the character under consideration in this case, then this right must be founded upon some exception incorporated in the act, and it is the contention of the learned counsel for the appellant that such exception is found in the proviso in § 1 of the Hepburn act. This section is given in part in the margin.[1]

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[1] Act of June 29, 1906, c. 3591, 34 Stat. 584. The term "common carriers" as used in this act shall include express companies and sleeping car companies.

* * * * * * * *

"No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employés and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of live stock, poultry, and fruit; to employés on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employés, post office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employés of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free

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As originally reported, this act did not apply to express companies. The section was originally framed with the intention of making a provision for railroad carriers. It is contended that the proviso brings common carriers within the exception of the act, and therefore necessarily includes the express companies. There is no doubt that a proviso has not infrequently been the means of introducing into a law independent legislation, notwithstanding it is the true office of a proviso to restrict the sense or make clear that which has gone before and which might be doubtful because of the generality of the language used. *United States* v. *Dickson*, 15 Pet. 141, 163. This court has had occasion to hold more than once that language used in provisos shows the legislative intention to bring in new matter rather than to limit or explain that which has gone before. *Georgia Banking Co.* v. *Smith*, 128 U. S. 174; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37.

While, therefore, a proviso may sometimes be construed as extending rather than limiting legislation, each statute must depend upon its own terms; and a proviso will be given such construction as is consistent with the legislation under construction.

Turning to § 1 of the Hepburn act, it is apparent that all that immediately precedes the proviso appertains to the carriage of passengers, for common carriers are forbidden to issue or give any free ticket, free pass or free transportation *for passengers*, except to its employés, etc. Until we come to the proviso, the act is clearly thus limited. It is then enacted that this provision, that is, the previous part of the enactment which refers only to the transportation of passengers, shall not be construed to prohibit the interchange of *passes* for the officers, agents and employés of common carriers and their families, or to prohibit any common carrier from *carrying passengers* free in certain cases.

While it is true the language here used has reference to com-

ticket, free pass, or free transportation, shall be subject to a like penalty."

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mon carriers and by the terms of the Hepburn act express companies are within that description, yet the proviso is as clearly limited to the carriage of passengers and the interchange of passes for officers, agents and employés of common carriers and their families, as is the body of the section itself.

It is contended that this section if limited to the carriage of passengers was unnecessary in view of the concluding part of § 22 of the act of February 4, 1887, c. 104, 24 Stat. 379, 387, as amended by the acts of March 2, 1889, c. 382, 25 Stat. 855, 862, and February 8, 1895, c. 61, 28 Stat. 643, which provides: "Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employés, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employés;" etc.

But we are to consider the language which Congress has used in passing a given law, and when the language is plain and explicit our only province is to give effect to the act as plainly expressed in its terms. We are clearly of the opinion that, without doing violence to the language used in § 1—including the proviso—its terms cannot be held to include the transportation of goods.

It is very likely that there is no substantial reason why Congress should not extend to express companies, their officers, agents and employés, corresponding privileges for free carriage of goods with those which are given to the officers, agents and employés of railroad companies in respect to transportation of persons, but—if the law is defective in this respect—the remedy must be applied by Congress and not by the courts.

We find no error in the decrees of the Circuit Court, and the same are

Affirmed.

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TEXAS AND PACIFIC RAILWAY COMPANY v. BOURMAN.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 56. Argued January 6, 7, 1909.—Decided February 23, 1909.

The engineer of a train, and the section foreman, are fellow-servants of a section hand, and the latter cannot recover against the employer for an injury occurring through the negligence of either of the former. *Northern Pacific Railroad* v. *Egeland*, 163 U. S. 93, distinguished. 160 Fed. Rep. 452, reversed.

THE facts are stated in the opinion.

Mr. Charles Payne Fenner, with whom *Mr. William Wirt Howe* was on the brief, for plaintiff in error:

Plaintiff's injury was not due to any negligence on the part of the railway company. A plaintiff, in the first instance, must show negligence on the part of the defendant. The negligence of a defendant, as stated in that case, cannot be inferred from a presumption of care on the part of the person injured. A presumption in the performance of duty attends the defendant as well as the person injured. It must be overcome by direct evidence. *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480–488.

There is no proof, or even pretense, that the railway company did not provide a safe place to work, that the appliances were not safe, or that there were any of those defects in machinery, track, platforms or the like which sometimes afford grounds of complaint, as considered in the case of *Choctaw &c. R. R. Co.* v. *McDade*, 191 U. S. 64.

Nor is there any proof of negligence on the part of any employé of the railway company, except Bourman himself. *Coyne* v. *Union Pac. Ry. Co.*, 133 U. S. 370.

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It is obvious that, even if the evidence did show any negligence on the part of defendant's employés other than Bourman himself, then it was the negligence of plaintiff's fellow-servants. *Louisville & Nashville R. R.* v. *Stuber*, 108 Fed. Rep. 934; *Thom* v. *Pittard*, 67 Fed. Rep. 232; *Northern Pac. R. R. Co.* v. *Charless*, 162 U. S. 359; *Baltimore & Ohio R. R. Co.* v. *Camp*, 65 Fed. Rep. 952; *Martin* v. *Railway Co.*, 65 Fed. Rep. 384; *Coulson* v. *Leonard*, 77 Fed. Rep. 538; *Railroad Co.* v. *Egeland*, 163 U. S. 73, discussed and distinguished.

Mr. Aldis B. Browne, with whom *Mr. Albert Voorhies*, *Mr. A. E. Livaudais*, *Mr. Oliver S. Livaudais* and *Mr. Alexander Britton* were on the brief, for defendant in error:

The generally-acknowledged doctrine under the law is that a servant entering employment impliedly agrees with his master to assume all ordinary risks incidental to the service, including that of negligence on the part of a fellow-servant, unless the master's personal negligence caused, or operated to cause, the injury complained of. See Barrows on Negligence, 125.

A servant has a right to expect a reasonable degree of care on the part of his master and those in authority under his master, and he may act in accordance with this assumption. Dresser, Employers' Liability, Assumption of Risks, par. 111, p. 528. If the master's negligence concurs with that of a fellow-servant to produce injury, the servant may recover, provided he did not, by his own negligence, contribute to the result. Barrows on Negligence, p. 146; *Tutrix* v. *Sellers*, 39 La. Ann. 1011; *Powers* v. *Calcasieu Sugar Company*, 48 La. Ann. 483; *McCarthy* v. *Whitney Iron Works*, 48 La. Ann. 978; *Bland & Wife* v. *Shreveport Belt Railway Company*, 48 La. Ann. 1057; *Wilson* v. *La. & N. W. R. Co.*, 51 La. Ann. 1134; *S. C.* 108 La. 590; *I. C. R. R.* v. *Josey*, 54 L. R. A. 78. See also: *Wenona Coal Co.* v. *Holmquist*, 152 Ill. Rep. 590; *A. A. Patten* v. *Railroad Co.*, 96 N. C. Sup. Rep. 455.

Even admitting that the accident was due to the fault of either the foreman, conductor or engineer, having the train in

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charge, this case comes under the exception where the company cannot avoid responsibility, for the reason that they themselves participated in the negligence and contributed to the accident. *Quebec Steamship Company* v. *Merchant*, 133 U. S. 375.

The defendant was not guilty of negligence in leaving the train in the manner shown by the evidence, nor can he be held accountable for having done so, because he was following the instructions of his superior, the vice principal of the company, his employer; and, that to be made guilty of negligence in obeying said order, it must be shown that he voluntarily and unnecessarily exposed himself to the danger. *David Ballard* v. *C., R. I. & P. R. Co.*, 51 Missouri, 453; *Northern Pac. R. R. Co.* v. *Egeland*, 56 Fed. Rep. 200; affirmed 163 U. S. 93; *Brown* v. *Ohio & Miss. Ry. Co.*, 138 Ind. Rep. 648; *McGinn* v. *McCormick*, 109 La. Ann. 396; *Hunn* v. *R. R. Co.*, 44 N. W. Rep. 502; *R. R. Co.* v. *Charless*, 162 U. S. 359; *Grand Trunk Ry. Co.* v. *Cummings*, 106 U. S. 700; *Milwaukee* v. *St. Paul R. R.*, 112 U. S. 377; *Ellis* v. *N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 546.

MR. JUSTICE MOODY delivered the opinion of the court.

The defendant in error, hereafter called the plaintiff, brought an action in the Circuit Court of the United States against the plaintiff in error, hereafter called the defendant, to recover damages for injuries alleged to have been suffered through the defendant's negligence. The plaintiff had a verdict, which was affirmed by the Circuit Court of Appeals, and under existing statutes regulating the jurisdiction of this court the defendant, because it is incorporated under a law of the United States, has a further appeal, and brings the judgment here by writ of error.

The facts of the case are few and simple. The plaintiff was a section hand employed by the defendant and working under direction of a foreman named Hadnott. The plaintiff, with others, had been employed under Hadnott's direction in clearing up a wreck near a flag station on the defendant's road. When the work was finished the men were taken aboard an express

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passenger train, known as the Cannon Ball, to be conveyed to Waggaman, a regular station on the road, where they lived. The express ordinarily did not stop at Waggaman, but simply slowed down to take on the mail. The conductor, however, directed the engineer to stop on this occasion and let the section hands off, and the train did in fact stop at Waggaman, though whether as the result of the order or of the injury to the plaintiff was in dispute. As the train approached Waggaman the men were standing on the steps of the car, ready to alight, and the train was slackening its speed. The plaintiff was on the lower step. What happened is shown by the plaintiff's testimony. He said:

"I stood all the time on the platform. The train blew for the station. When she blew we all got on the steps with our tools in our hands. She was slacking up speed. I was on the lower step, holding on to the rod of the step. That was the way to get off when we was to get off at the depot. The foreman said: 'Boys, throw your tools off, and let us get off.' That was before she got to the station; and when she slacked up, she slacked up slow enough for anybody to get off, and when I went to get off she jerked; and I grabbed, and the engineer put more speed to the engine, and that threw me down and I could not let go, and she dragged me along until I got weak in the arms, and let go. She was running slow and she slacked up speed, and then she let go again and she made a jerk. After she slacked she started up again. I held on until I lost my grip and could not hold on any more. I fell, going under, and the wheel run over my leg. The conductor hallooed to the engineer to back up the train. He said: 'He ought to be satisfied.'"

On cross-examination he testified as follows:

"Q. Did he (the foreman) speak to you? A. No, sir; he did not.

"Q. He said nothing to you at all? A. When we were on the way coming we were all speaking, but when the train slacked up—when they blew the whistle for the train to stop at the depot, he told us, 'Boys, get your tools, we will get off.'

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"Q. That was while she was slacking up? A. Yes, sir.

"Q. You say that you jumped when the train slowed at the depot? A. Yes, sir.

"Q. That was before it stopped? A. She was not going to stop there at all.

"Q. You did not know that, that is, before she stopped? A. Well, she did not stop at all.

"Q. You jumped while the train was moving? A. Yes, sir.

"Q. Then you say that the train started up suddenly? A. Yes, sir; at the time I was getting off, she jerked before I jumped loose.

"Q. Do you think it would have been the same, that you would have been hurt if the train had not started again? A. No, sir; I do not think it would."

The petition, which was very inartificially drawn, does not clearly state the ground upon which the plaintiff sought to hold the defendant liable. It states generally that "said misfortune" was "due to the fault and negligence of the said defendants;" that the plaintiff was "entitled to a safe transport" to Waggaman; and that the "train being about to pass the station your petitioner had no further alternative than when ordered by his foreman to jump from the moving train, which just then increased its speed."

The answer denied the allegations of the petition and averred that if the plaintiff was injured it was by his own voluntary act in jumping from the train or through the negligence of one or the other of his fellow-servants—the section foreman, or the conductor and engineer of the train.

But passing the question of pleadings, upon which nothing seems to have turned below, we consider the case as it appears from the evidence. Since the plaintiff jumped from the train in obedience to a suggestion, if not an order, of his immediate superior, the section foreman, the jury might have found that the plaintiff reasonably thought he could rely upon the judgment of the section foreman, and that under the circumstances the plaintiff's act was not so obviously reckless and dangerous

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as to constitute contributory negligence. *Northern Pacific Railroad* v. *Egeland*, 163 U. S. 93. It becomes necessary, then, to consider the negligence of the defendant. The evidence discloses two possible grounds upon which a recovery might be rested; first, carelessness of the section foreman in directing the plaintiff to jump when he did; second, carelessness of the engineer in suddenly starting up the train after it had slowed down. These two possible causes of the plaintiff's injury were distinctly before the jury and the defendant had the right to appropriate instructions upon the issues thus raised. The jury may well have based its verdict on either the carelessness of the section foreman or the carelessness of the engineer. Indeed, it is difficult to see any other theory upon which the verdict was rendered. It may be, as thought by the Circuit Court of Appeals, that the instructions to the jury were academically correct, so far as they went, but they omitted to cover vitally important aspects of the case and were therefore insufficient.

The presiding judge refused to instruct the jury as requested by the defendant, that the engineer and the section foreman were, respectively, fellow-servants of the plaintiff, and that if the injury occurred through the negligence of either, the plaintiff was not entitled to recover. We think these instructions should have been given. Both the engineer and the section foreman were fellow-servants of the plaintiff and if the plaintiff's injury was caused by the negligence of either, the law, as it many times has been declared by this court, will not permit a recovery. *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368; *Northern Pacific Railroad* v. *Hambly*, 154 U. S. 349; *Central Railroad Company* v. *Keegan*, 160 U. S. 259; *Northern Pacific Railroad* v. *Peterson*, 162 U. S. 346; *Northern Pacific Railroad* v. *Charless*, 162 U. S. 359; *Martin* v. *Atchison, Topeka & Santa Fe Railroad*, 166 U. S. 399; *Alaska Mining Company* v. *Whelan*, 168 U. S. 86; *New England Railroad* v. *Conroy*, 175 U. S. 323; *Northern Pacific Railroad* v. *Dixon*, 194 U. S. 338.

The case of *Northern Pacific Railroad* v. *Egeland*, *supra*, which evidently was misunderstood in the court below, is not

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in any way inconsistent with the foregoing cases. The fellow-servant doctrine was not there considered by the court. The plaintiff in that case was a section hand, who received injuries by jumping from a moving train in obedience to the order of the conductor. The only question before this court was whether the act of the plaintiff was in itself, as matter of law, contributory negligence, and it was held that under the circumstances disclosed in the evidence it was proper to submit the question of contributory negligence to the jury. It does not appear in that case what was the negligence for which the plaintiff sought to hold the defendant responsible. In the trial court the defendant made two requests: First, that no negligence on the part of the defendant was shown; and, second, that the plaintiff was guilty of such contributory negligence that he could not recover. The defendant saw fit to bring to this court only the question of contributory negligence, and the opinion of the court expressly stated that the discussion would be confined to that question alone. An examination of the case, as it was exhibited to the Circuit Court of Appeals, discloses that contributory negligence was the only question passed upon by that court. 56 Fed. Rep. 200.

Judgment reversed.

TOY TOY *v.* HOPKINS, UNITED STATES MARSHAL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 49. Argued December 9, 1908.—Decided February 23, 1909.

After the Circuit Court of the United States has heard and passed on evidence affecting its jurisdiction, its judgment is open to review in the appellate court by writ of error, but the judgment cannot be attacked collaterally as absolutely void.

Even though the Circuit Court erroneously retains jurisdiction of a criminal case against an allottee Indian, its judgment is not void but should be corrected on appeal or by writ of error and cannot be attacked in *habeas corpus* proceedings.

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In re Heff, 197 U. S. 488, as explained in *In re Lincoln*, 202 U. S. 178, distinguished.

THE facts are stated in the opinion.

Mr. A. E. Crane, with whom *Mr. F. T. Woodburn* was on the brief, for appellant:

The statute under which the petitioner was prosecuted applies only to murders committed by Indians upon reservations within States. The Federal courts have no jurisdiction of offenses committed by citizen Indians. *United States* v. *Kagama*, 118 U. S. 375; *State* v. *Smokalen*, 79 Pac. Rep. 603; *United States* v. *Thomas*, 151 U. S. 585; *State* v. *Campbell*, 55 N. W. Rep. 553.

The petitioner being a citizen of the United States and of the State of Oregon at the time of the commission of the offense charged in the indictment, the act of Congress, if it applies, was unconstitutional and void as attempting to usurp the police powers of the State. The case of *In re Heff*, 197 U. S. 488, is decisive of this point.

The petitioner, having taken an allotment of land in severalty and the preliminary patent having been issued therefor, was a citizen of the United States and of the State of Oregon, by virtue of the act of Congress of February 8, 1887. *In re Heff*, 197 U. S. 488; *In re Now-Ge-Zhuck*, 76 Pac. Rep. 877; *United States* v. *Rickert*, 106 Fed. Rep. 5; *Farrell* v. *United States*, 110 Fed. Rep. 942, 947; *State ex rel. Crawford* v. *Norris*, 37 Nebraska, 299; *Boyd* v. *Nebraska*, 143 U. S. 155; *Guyatt* v. *Kautz*, 83 Pac. Rep. 9.

The act of March 3, 1885, applies only when the crime is committed by a tribal Indian and when the offense is committed on an Indian reservation. To sustain an indictment under that act, it is necessary to prove that the defendant at the time of the commission of the offense was a tribal Indian and that the crime was committed upon an Indian reservation. The Umatilla Indian reservation had been allotted in severalty to the members of the tribe at the time of the commission of

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the offense and it was not an Indian reservation and the Circuit Court had no jurisdiction for that reason. *Forty-Three Cases of Brandy*, 14 Fed. Rep. 539; *United States* v. *Kagama*, 118 U. S. 383; *United States* v. *Richert*, 106 Fed. Rep. 6; *Draper* v. *United States*, 164 U. S. 240, 246; *State* v. *Campbell*, 55 N. W. Rep. 553, 555.

When a court acts without authority its judgment and orders are regarded as nullities. They form no bar to a remedy sought in opposition to them even prior to reversal. The jurisdiction of any court, exercising authority over a subject, may be inquired into when the proceedings of the former are relied upon. When a court assumes to act where it has no jurisdiction, its adjudications would be utterly void as an estoppel. *In re Heff*, 197 U. S. 488; *Basso Case*, 40 Ct. Cl. 202; *In re Cuddy*, 131 U. S. 280, 286; *Kilbourn* v. *Thompson*, 103 U. S. 168; *In re Mayfield*, 141 U. S. 107; *Thompson* v. *Whitman*, 18 Wall. 457; *Perry, Admr.*, v. *St. Joe & W. R. R. Co.*, 29 Kansas, 420, 423; *Griffith* v. *Frazier*, 8 Cranch, 23; *Scott* v. *McNeal*, 154 U. S. 34; *Thompson* v. *Tolmi*, 2 Pet. 157, 163; *Wise* v. *Withers*, 3 Cranch, 331, 337; *Rose* v. *Himley*, 4 Cranch, 241, 268; *Cooper* v. *Newell*, 173 U. S. 555; *Dow* v. *Johnson*, 100 U. S. 158.

If the Circuit Court did not have jurisdiction of the subject-matter of the action, the acts and conduct of the petitioner could not give it jurisdiction and do not estop him. Jurisdiction can only be conferred by the sovereign authority which organizes the court. A void judgment cannot be the basis of an estoppel. *State* v. *Jennings*, 24 Kansas, 654; *Gruner* v. *United States*, 11 How. 163; *McKinnon* v. *Hall*, 50 Pac. Rep. 1052; *Cooper* v. *Reynolds*, 10 Wall. 316; *Dicks* v. *Hatch*, 10 Iowa, 380; *Springer* v. *Shavender*, 54 Am. St. Rep. 708; *Savage* v. *Sternberg*, 19 Washington, 679; *Elliott* v. *Piersol*, 1 Pet. 328; *Wilcox* v. *Jackson*, 13 Pet. 511.

If the indictment in question in this case had alleged that Toy Toy was an Indian to whom an allotment of land in severalty had been made and that he had received his preliminary patent therefor, the judgment would have been void upon its

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face and could have been questioned in this action. By a failure to allege the facts, the court cannot acquire jurisdiction. *Dicks* v. *Hatch*, 10 Iowa, 384; *Murray* v. *Am. Surety Co.*, 10 Fed. Rep. 341; *Ex parte Nielson*, 131 U. S. 176, 182; *County Commr.* v. *K. C., F. S. & M. R. Co.*, 47 Pac. Rep. 327; *Morton* v. *Shelby & Co.*, 118 U. S. 441.

The Solicitor General for appellee:

Appellant and Columbia George have been convicted both in the state and Federal courts of Oregon, and sentenced in the Federal court to life imprisonment. After the lapse of four years their counsel applied to this court for leave to file a petition for a writ of *habeas corpus*, and on the denial of that motion, a petition for the writ on behalf of this appellant alone was filed in the United States Circuit Court for the Western District of Washington. This course is simply a persistent effort to thwart justice to the end that two doubly convicted criminals should go unpunished.

The record affirmatively shows that the Circuit Court for Oregon had jurisdiction and was authorized to hear and pass upon the questions involved. Its decision was open to review in the appellate court by writ of error, and defendants, having chosen not to pursue that course, cannot now attempt to secure a correction of the alleged errors through a writ of *habeas corpus*. This court has repeatedly ruled that the writ of *habeas corpus* cannot be made to perform the functions of a writ of error. *In re Eckart*, 166 U. S. 481; *Dimmick* v. *Tompkins*, 194 U. S. 540; *Riggins* v. *United States*, 199 U. S. 547; *Valentina* v. *Mercer*, 201 U. S. 131; *Felts* v. *Murphy*, 201 U. S. 123; *In re Lincoln*, 202 U. S. 178.

The decision of the Circuit Court cannot be impeached collaterally as absolutely void. The conviction here in the state and Federal courts have carried the guilt of this defendant into the region of fixed and established facts beyond the effect of any alleged failure of jurisdiction, on a question raised years afterwards, to overthrow. See *United States* v. *Chandler*-

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Dunbar Water Power Co., 209 U. S. 447; *Louisiana* v. *Garfield*, 211 U. S. 70.

The court has shown no disposition to extend the decision in *In re Heff*, 197 U. S. 488, which must be considered in the light of the facts of that case. *In re Lincoln*, 202 U. S. 178. Notwithstanding the Heff decision, Congress may exercise police control over lands allotted in severalty as to which the Indian title is extinguished, although the Indians may be citizens and the lands within the limits of a State. That may be the effect of an agreement with the Indians ratified by Congress. *Dick* v. *United States*, 208 U. S. 340. The act of May 3, 1885, 23 Stat. 340, providing for allotments in severalty on the Umatilla reservation, produces the same effect. Notwithstanding the allotment it was the intention of Congress to maintain the reservation within reduced limits, and to preserve the tribal relations. That law was so construed by the Supreme Court of Oregon in *State* v. *Columbia George*, 39 Oregon, 127, 138, 147; see also *United States* v. *Flournoy Live Stock Co.*, 71 Fed. Rep. 576; *S. C.*, 79 Fed. Rep. 886.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Toy Toy and Columbia George, both Indians of the Umatilla tribe, were jointly indicted in a state court in Oregon for the crime of murder in the first degree, committed on an Indian woman on the United States Indian reservation in Umatilla County, Oregon; were separately tried and convicted, and each sentenced to death. Columbia George appealed from the judgment of conviction on the ground, among others, that the state court was without jurisdiction, inasmuch as the crime was committed by Indians upon an Indian on an Indian reservation, and that it was therefore within the exclusive jurisdiction of the Federal courts. In a careful opinion by Wolverton, J., the Supreme Court of the State of Oregon upheld this contention, and, reversing the judgment of the trial court, ordered the dis-

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charge of the defendant. *State* v. *Columbia George*, 39 Oregon, 127. Thereupon defendants were indicted under § 5339 of the Revised Statutes in the Circuit Court of the United States for the District of Oregon, regularly tried and convicted of murder (without capital punishment) and sentenced to imprisonment for the term of their natural lives.

At October term, 1905, application was made to this court for leave to file a petition for the writ of *habeas corpus*, which was denied March 5, 1906. 201 U. S. 641. Thereafter a petition for writ of *habeas corpus* on behalf of Toy Toy only was filed in the Circuit Court of the United States for the Western District of Washington. That court denied the petition, and the case is now before this court on appeal.

The indictment in this case charged Columbia George and Toy Toy, Indians, with the murder of Annie Edna, an Indian woman, upon the Umatilla Reservation within the State and District of Oregon.

On the face of the record the United States Circuit Court for the District of Oregon, in which these Indians were last tried and convicted, had jurisdiction of the offense and of the defendants. They were tried, found guilty and sentenced to the penitentiary for life. Five years thereafter Toy Toy applied for the writ of *habeas corpus*, and alleged that the indictment, arraignment, trial, judgment, sentence and commitment were wholly null and void for want of jurisdiction over subject-matter and person. The petition alleged:

"That the place where said Annie Edna was killed was a tract of land which had once been a part of the Umatilla Indian Reservation, in the State of Oregon, but that long prior to and at the time of the death of the said Annie Edna the said tract of land had been allotted to one Tatzhammer, and a patent for the said land had been duly issued to her, by the United States, as a member of the Umatilla tribe of Indians. And that the said premises whereon said Annie Edna was killed, by reason of said allotment and patent, ceased to be Indian country and ceased to be a part of the said Umatilla Indian Reservation

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in Oregon. That on the 16th day of September, 1899, your petitioner, who was prior thereto a member of the Umatilla tribe of Indians, received an allotment of land from what had theretofore been a part of the Umatilla Indian Reservation in Oregon, and received from the United States a preliminary patant for said allotment, and by reason of said allotment and patent of land, and by virtue of the act of Congress, approved February 8, 1887, your petitioner became, and at the time of the killing of the said Annie Edna on the 24th day of August, 1900, was, and at all times since has been a citizen of the United States and of the State of Oregon, and subject to its laws.

"Your petitioner further states that he was born within the territorial limits of the United States, and that at the time of the killing of the said Annie Edna your petitioner had voluntarily taken up within the limits of the United States his residence, separate and apart from the Umatilla tribe of Indians, and had adopted the habits of civilized life, and that for all of the reasons heretofore given the act of Congress of March 3, 1885, is unconstitutional and void when applied to the facts herein set out."

If such were the facts, and they made out a want of jurisdiction under the applicable statutes, which on the merits we do not hold, the Circuit Court, nevertheless, was authorized to hear and pass upon those questions in the first instance, and its decision was open to review in the appellate court by writ of error. But it could not be attacked collaterally as absolutely void, and *habeas corpus* cannot be availed of as a writ of error.

"It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void, which are without validity until confirmed." 8 Bac. Abr. Void and Voidable; *Ewell* v. *Daggs*, 108 U. S. 143; *Weeks* v. *Bridgman*, 159 U. S. 541, 547; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 25. In the latter case we said, among other things:

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"Jurisdiction as to the subject-matter may be limited in various ways, as to civil and criminal cases; cases at common law or in equity or in admiralty; probate cases, or cases under special statutes; to particular classes of persons; to proceedings in particular modes; and so on. In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where, in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review."

And see *United States* v. *Shipp*, 203 U. S. 563.

We are of opinion that the Circuit Court was right in denying the application for the writ of *habeas corpus* and that its final order must be affirmed.

It is true that the writ was granted in the case of *In re Heff*, 197 U. S. 488, but the explanation of that case, given in the case of *In re Lincoln*, 202 U. S. 178, deprives it of any weight here.

Final order affirmed.

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PER CURIAM OPINIONS DELIVERED BY THE SUPREME COURT OF THE UNITED STATES FROM OCTOBER 12, 1908, TO FEBRUARY 23, 1909.

BILIK *v.* STRASSHEIM, SHERIFF OF COOK COUNTY, ILLINOIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 445. Motion to dismiss or affirm.—Submitted October 13, 1908.—Decided October 19, 1908.

Appeal from judgment of Circuit Court, denying petition for writ of *habeas corpus* where petitioner was held under process of the state court, dismissed for want of jurisdiction. There was no certificate of probable cause for allowing the appeal as required by the act of March 10, 1908, c. 76, 35 Stat. 40.[1]

Mr. Francis E. Hinckley and *Mr. S. S. Gregory* for appellant.

Mr. John J. Healy, State Attorney, *Mr. Erasmus C. Lindley* and *Mr. James J. Barbour* for appellee.

Per Curiam: Dismissed for want of jurisdiction.

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[1] The act in question is as follows:

CHAP. 76.—An Act Restricting in certain cases the right of appeal to the Supreme Court in *habeas corpus* proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from a final decision by a court of the United States in a proceeding in *habeas corpus* where the detention complained of is by virtue of process issued out of a state court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.

Approved, March 10, 1908, 35 Stat. 40.

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* CITY OF TYLER, TEXAS.

WRIT OF ERROR TO THE SUPREME COURT OF TEXAS.

No. 159. Motion to dismiss or affirm.—Submitted October 19, 1908.—Decided October 26, 1908.

Writ of error to review 99 Texas, 491, dismissed for want of jurisdiction, there being a non-Federal ground on which the judgment rested sufficient to sustain it without regard to the Federal question, if any, involved.

Mr. Cone Johnson, Mr. Horace Chilton, Mr. Ben B. Cain and *Mr. James M. Edwards,* for defendants in error in support of the motion.

Mr. E. B. Perkins and *Mr. Hiram Glass* for plaintiffs in error.

Per Curiam: Writ of error dismissed for want of jurisdiction. *Eustis* v. *Bolles,* 150 U. S. 361; *Railway Company* v. *Fitzgerald,* 160 U. S. 556; *Moran* v. *Horsky,* 178 U. S. 205; *Johnson* v. *Risk,* 137 U. S. 300–307; *Chicago & Alton Railroad* v. *Wiggins Ferry Company,* 119 U. S. 615; *Eagan* v. *Hart,* 165 U. S. 188.

THE UNITED STATES AND THE CHEROKEE NATION *v.* HEMPHILL AND MURCHISON.

APPEAL FROM THE COURT OF CLAIMS.

No. 529. Motion to dismiss or affirm.—Submitted October 26, 1908.—Decided November 2, 1908.

Appeal from judgment of the Court of Claims fixing amounts to be paid from an Indian fund dismissed for want of jurisdiction.

Mr. John J. Hemphill and *Mr. Kenneth S. Murchison,* the appellees, in support of the motion.

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The Attorney General, Mr. Assistant Attorney General John Q. Thompson, Mr. George M. Anderson and *Mr. William W. Hastings*, for the appellants, in opposition to the motion.

Per Curiam: Appeal dismissed for want of jurisdiction. 34 Stat. c. 3504, pp. 325, 340; *Ex parte Atocha*, 17 Wall. 439; Rev. Stat. § 707.

COULSON *v.* GOVERNMENT OF THE CANAL ZONE.

ERROR TO THE SUPREME COURT OF THE CANAL ZONE.

No. 187. Motion to dismiss or affirm.—Submitted November 2, 1908.—Decided November 9. 1908.

Writ of error to review judgment of the Supreme Court of the Canal Zone dismissed for want of jurisdiction.

The Attorney General and *The Solicitor General* for defendant in error in support of the motion.

Mr. Moorfield Storey and *Mr. Franklin E. Brooks* for plaintiff in error in opposition to motion to dismiss or affirm.

Per Curiam: Writ of error dismissed for want of jurisdiction.

MATTER OF COULSON.

PETITION FOR WRIT OF HABEAS CORPUS AND WRIT OF CERTIORARI.

Original. Submitted November 2, 1908.—Decided November 9, 1908.

Leave to file petition for writ of *habeas corpus* by person sentenced by Supreme Court of the Canal Zone denied.

Mr. Moorfield Storey for petitioner.

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The Solicitor General, by leave of the court, filed a brief in opposition.

Per Curiam: Motion for leave to file a petition for writs of *habeas corpus* and certiorari denied.

MATTER OF HARDRAT.

APPLICATION FOR WRIT OF HABEAS CORPUS.

Original. Submitted November 9, 1908.—Decided November 16, 1908.

Leave to file petition for *habeas corpus* by person confined under indeterminate sentence act of Michigan, denied.

Mr. Frederick S. Tyler presented the application on behalf of the petitioner.

No brief was filed in opposition.

Per Curiam: Motion for leave to file a writ of *habeas corpus* denied.

MATTER OF CHESAPEAKE & OHIO RAILWAY COMPANY.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

Original. Submitted November 9, 1908.—Decided November 16, 1908.

Leave to file petition for mandamus to compel Circuit Court to retain jurisdiction of a condemnation proceeding refused.

Mr. F. B. Enslow and *Mr. J. L. Bumgardner* for petitioner.

Mr. Edward W. Knight, opposing.

Per Curiam: Motion for leave to file a petition for a writ of mandamus denied.

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Ex parte PATRICK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Submitted November 9, 1908.—Decided November 16, 1908.

Appeal from decision of the Circuit Court denying a petition for *habeas corpus* when petitioner was detained under power of a state court dismissed for want of jurisdiction. There was no certificate of probable cause for allowing the appeal in conformity with the act of March 10, 1908, c. 76, 35 Stat. 40.[1]

Mr. Albert T. Patrick in *propria persona* and *Mr. William L. McDonald* for the appellant.

Mr. Robert C. Taylor for the State of New York appeared by leave of the court.

Per Curiam: Appeal dismissed for want of jurisdiction. Act of March 10, 1908, c. 76, 35 Stat. 40; *Bilik* v. *Strassheim*, sheriff of Cook County, Illinois, decided October 19, 1908, *ante*, p. 551. Application for writ of *habeas corpus* denied.

WATER, LIGHT & GAS COMPANY *v.* CITY OF HUTCHINSON, KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 21. Argued November 13, 1908.—Decided November 16, 1908.

Water, Light & Gas Co. v. *Hutchinson*, 207 U. S. 385, in which it was held that an exclusive franchise cannot, under the statutes of Kansas, be granted by ordinance by a city of the second class, followed.

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[1] For this act in full see *ante*, p. 551.

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Mr. Howard S. Lewis, Mr. H. Whiteside, Mr. John F. Dillon, Mr. Harry Hubbard and *Mr. Frank Doster* for appellant.

Mr. Max Pam and *Mr. A. C. Mallory* for appellees.

Per Curiam: Affirmed with costs, on authority of *Water, Light & Gas Co. of Hutchinson* v. *The City of Hutchinson,* 207 U. S. 385.

WESTERN LOAN & SAVINGS COMPANY *v.* COLORADO SMELTING & MINING COMPANY.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 581. Submitted November 9, 1908.—Decided November 16, 1908.

Western Loan Co. v. *Butte & Boston Mining Co.,* 210 U. S. 368, followed.[1]

Mr. John A. Shelton, for plaintiff in error.

No appearance for defendant in error.

Per Curiam: Judgment reversed with costs, and cause remanded on authority of *Western Loan & Savings Co.* v. *The Butte & Boston Consolidated Mining Co.,* 210 U. S. 368.

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[1] The points involved in this case, as stated in the headnote of *Western Loan Co.* v. *Butte & Boston Mining Co.,* are as follows:

"Where diversity of citizenship exists so that the suit is cognisable in some Circuit Court the objection to the jurisdiction of the particular court in which the suit is brought may be waived by appearing and pleading to the merits. *In re Moore,* 209 U. S. 490, overruling anything to the contrary in *Ex parte Wisner,* 203 U. S. 449.

"In a State where objection that the court has not jurisdiction of the person must—as in Montana under Code, § 1820—be taken by special appearance and motion aimed at the jurisdiction, the interposition by defendant of a demurrer going to the merits as well as to the jurisdiction amounts to a waiver of the objection that the particular Circuit Court in which he is sued is without jurisdiction."

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ENRIQUEZ, ADMR., ETC., v. A. S. WATSON & CO., LIMITED.

WRIT OF ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 5. Argued November 11, 1908.—Decided November 16, 1908.

A writ of error to review judgment of the Supreme Court of the Philippine Islands, dismissed for want of jurisdiction.
See 6 Philippine, 84, 114.

Mr. J. H. Ralston and *Mr. F. L. Siddons* for plaintiff in error.

Mr. W. A. Kincaid, Mr. A. B. Browne and *Mr. Alexander Britton* for defendants in error.

Per Curiam: Dismissed for want of jurisdiction.

AMERICAN SURETY CO. v. AKRON SAVINGS BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 19. Argued November 12, 1908.—Decided November 30, 1908.

Judgment of the state court to effect that surety on bond of the depositary of a receiver in bankruptcy which ran, as required by law, to the United States, was not entitled to priority in distribution of assets of the depositary, affirmed without opinion.

Mr. Frederic D. McKenney, Mr. John Spalding Flannery and *Mr. Henry C. Wilcox* for plaintiff in error.

Mr. John C. Gittings, Mr. Charles R. Grant, Mr. Alexander Muncaster and *Mr. J. M. Chamberlin* for defendants in error.

Per Curiam: Judgment affirmed with costs without opinion.

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THE PHŒNIX CONSTRUCTION COMPANY *v.* THE STEAMER POUGHKEEPSIE &c. AND THE STEAMER HOMER RAMSDELL &c. CENTRAL HUDSON STEAMBOAT COMPANY, CLAIMANT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 401. Motion to dismiss or affirm.—Submitted October 26, 1908.—Decided November 30, 1908.

The judgment of the admiralty court dismissing for want of jurisdiction a libel against a vessel for damages to a pipe on the bottom of the Hudson River, affirmed without opinion.

Mr. E. Crosby Kindelberger for libellant appellant:

Mr. J. Parker Kirlin for claimant appellee.

Per Curiam: Decree affirmed with costs. *Cleveland Terminal & Valley Railroad Company* v. *Cleveland Steamship Company*, 208 U. S. 316; *The Troy*, 208 U. S. 321.

ABRAMS *v.* WHITE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 176. Motion to dismiss.—Submitted November 16, 1908.—Decided November 30, 1908.

Appeal dismissed for want of jurisdiction on authority of *Kansas City Northwestern Railroad Co.* v. *Zimmerman*, 210 U. S. 336.[1]

Mr. Aldis B. Browne, Mr. Alexander Britton, Mr. Isham N. Smith and *Mr. James E. Babb* attorneys for appellees.

No appearance for appellants.

Per Curiam: Appeal dismissed for want of jurisdiction. *Kansas City Northwestern Railroad Co.* v. *Zimmerman*, 210 U. S. 336.[1]

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[1] The headnote in that case is as follows:

"Where the ground on which the jurisdiction of the circuit court was

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THORNTON v. CITY OF NATCHEZ.

ERROR TO THE SUPREME COURT OF MISSISSIPPI.

No. 462. Motion to dismiss or affirm.—Submitted November 16, 1908.—Decided November 30, 1908.

Writ of error to review judgment of state court, 88 Mississippi, 1, dismissed for want of jurisdiction under § 709, Rev. Stat., without opinion.

Mr. Robert H. Thompson, Mr. Thomas A. McWillie and *Mr. William C. Martin* for defendants in error in support of the motion.

Mr. Wade R. Young for plaintiffs in error in opposition to motion to dismiss.

Per Curiam: Writ of error dismissed for want of jurisdiction. *Thornton* v. *Natchez*, 88 Mississippi, 1; *S. C.*, 129 Fed. Rep. 86, 87; *S. C.*, 197 U. S. 620; *Harrison* v. *Myer*, 92 U. S. 111; *Moran* v. *Horsky*, 178 U. S. 205; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Beals* v. *Cone*, 188 U. S. 184; *Winona & St. Peter Railroad Company* v. *Plainview*, 143 U. S. 371, 390; *Hammond* v. *Johnston*, 142 U. S. 73.

SHAW v. UNITED STATES.

APPPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 426. Motion to dismiss or affirm.—Submitted November 16, 1908.—Decided November 30, 1908.

American Sugar Refining Co. v. *United States*, 211 U. S. 155, which held that a direct appeal from the Circuit Court would not lie in a case

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denied did not go to its jurisdiction as a Federal court as such, but its jurisdiction was denied on the ground that the state court where the proceedings started had no jurisdiction, a direct appeal on the jurisdictional question will not lie to this court under § 5 of the judiciary act of 1891."

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where the only real substantial point was whether an officer of the United States had misconstrued the tariff act of 1897, followed, and appeal dismissed.

Writ of error to reverse 141 Fed. Rep. 469, dismissed.

The Attorney General and *The Solicitor General* for the appellee in support of the motion.

Mr. Edward S. Hatch, for the appellant, in opposition to the motion.

Per Curiam: Appeal dismissed for want of jurisdiction. *Shaw* v. *United States*, 141 Fed. Rep. 469; *United States* v. *Shaw*, 144 Fed. Rep. 329, and opinion of Board of General Appraisers, *Shaw* v. *United States*, 203 U. S. 591; *American Sugar Refining Company* v. *United States*, decided to-day, 211 U. S. 155.

PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY *v.* LIGHTHEISER.

SAME *v.* COLLINS.

SAME *v.* ROSS.

WRITS OF ERROR TO THE SUPREME COURT OF INDIANA.

Nos. 141, 142, 178. Motions to dismiss or affirm, and for damages.—Submitted November 30, 1908.—Decided December 7, 1908.

Writs of error to review judgments of Supreme Court of State of Indiana, 168 Indiana, 438, 467, and 80 N. E. Rep. 845, in suits involving the constitutionality of the Employers' Liability Act of that State dismissed for want of jurisdiction without opinion. *Tullis* v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348, followed.

Mr. Stewart T. McConnell, *Mr. Albert G. Jenkines*, *Mr. Bertram C. Jenkines* and *Mr. Charles H. Stuart* for defendants in error in support of the motions.

Mr. Allen Zollars and *Mr. George E. Ross* for plaintiff in error in opposition to the motions.

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Per Curiam: Writs of error severally dismissed for want of jurisdiction. *Tullis* v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348, and cases cited; *Pittsburg &c. Ry. Co.* v. *Lightheiser*, 168 Indiana, 438; *Same* v. *Collins*, 168 Indiana, 467; and *Same* v. *Ross*, 80 N. E. Rep. 845.

In re JONES.

PETITION FOR MANDAMUS AND MOTION FOR LEAVE TO FILE THE SAME.

Submitted December 7, 1908.—Decided December 14, 1908.

Leave to file petition for mandamus to direct a suit against a corporation incorporated under act of Congress to be remanded to the state court, refused.

Mr. S. P. Jones for petitioner:

There was no appearance for any of the other parties.

Per Curiam: Motion for leave to file a petition for a writ of mandamus denied.

[As to the right of the Texas & Pacific Railway Co. to remove a case, on the ground that it is a corporation organized under an act of Congress, see *Matter of Dunn*, *ante*, p. 374.]

GAINES v. KNECHT.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 52. Argued December 11, 1908.—Decided December 14, 1908.

Writ of error to review decision of Court of Appeals of the District of Columbia on appeal from Commissioner of Patents, 27 App. D. C. 530, dismissed on authority of *Frasch* v. *Moore*, 211 U. S. 1.

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Mr. James L. Hopkins, *Mr. Daniel W. Lindsey* and *Mr. Alfred A. Eicks* for plaintiff in error.

Mr. Arthur E. Wallace for defendant in error.

Per Curiam: Writ of error dismissed for want of jurisdiction. *Frasch* v. *Moore*, 211 U. S. 1. See act of February 20, 1905, for the registration of trade-marks, c. 592, 33 Stat. 724, §§ 9, 16, 17, 18, *et passim*.

[The headnote in *Frasch* v. *Moore* also appears as a note to *Atkins* v. *Moore*, *ante*, p. 285; and see *ante*, p. 290, for reference to point decided in *Gaines* v. *Knecht*.]

CLEVENGER, TRUSTEE IN BANKRUPTCY, *v.* CHANEY.

SAME *v.* LYLE.

SAME *v.* NICHOLS.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPLICATIONS FOR WRITS OF CERTIORARI.

Nos. 221, 222, 223. Motions to dismiss or affirm and applications for certiorari submitted December 7, 1908.—Decided December 14, 1908.

Appeals from the Circuit Court of Appeals affirming orders and decrees of the bankruptcy court dismissed for want of jurisdiction without opinion on authority of *Chapman* v. *Bowen*, 207 U. S. 89.[1]

Mr. E. E. Clevenger and *Mr. Cook Danford*, for appellants.

Mr. A. H. Mitchell for appellees.

Per Curiam: Appeals dismissed for want of jurisdiction. Applications for certiorari denied. *Chapman, Trustee, &c.*, v. *Bowen*, 207 U. S. 89.

[[1] The headnote in *Chapman* v. *Bowen*, 207 U. S. 89, is as follows:

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CHICAGO & ALTON RAILWAY COMPANY v. UNITED STATES.

FAITHORN v. SAME.

WANN v. SAME.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Nos. 238, 239, 240. Argued October 21, 22, 1908.—Decided January 4, 1909.

This court by a divided court and without opinion affirms the judgment of the lower court holding a common carrier guilty of violating § 1 of the Elkins act of February 19, 1903, c. 708, 32 Stat. 847. The contention of the carrier was that the amount paid to the shipper was for use of tracks owned by the shipper, although there was no reference thereto in the published rate.

Mr. Blackburn Esterline and *Mr. Ralph M. Shaw*, with whom *Mr. Frederick S. Winston*, *Mr. Robert Mather*, *Mr. John Barton Payne* and *Mr. Silas H. Strawn* were on the brief, for petitioners.

The Attorney General and *The Solicitor General* for respondent.

Per Curiam: Judgment affirmed by a divided court, and causes remanded to the District Court of the United States for the Northern District of Illinois.

"Clause 3 of general order in bankruptcy XXXVI applies to appealable cases and must be complied with.

"This appeal cannot be maintained because it does not come within either paragraph 1 or paragraph 2 of § 25*b* of the bankruptcy act.

"Where the decision below proceeds on principles of general law broad enough to sustain it without reference to provisions of the bankruptcy act, the question involved is not one which would justify a writ of error from the highest court of a State to this court.'"]

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CLAY CENTER ELECTRIC LIGHT & POWER CO. *v.* CITY OF CLAY CENTER.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 630. Motion to dismiss.—Submitted January 4, 1909.—Decided January 11, 1909.

Writ of error to review a judgment of the state court dismissed. The Federal question was raised for the first time on petition for rehearing in the Supreme Court of the State, and that court declined to pass on it as having come too late.

Mr. A. E. Crane, Mr. F. B. Dawes, Mr. C. P. Rutherford and *Mr. R. C. Miller,* for defendant in error in support of motion to dismiss.

Mr. C. C. Coleman and *Mr. Frank L. Williams* for plaintiff in error.

Per Curiam: Writ of error dismissed for want of jurisdiction. *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648; *Capital National Bank of Lincoln* v. *First National Bank of Cadiz,* 172 U. S. 425; *Mutual Life Insurance Company* v. *McGrew,* 188 U. S. 291, 308; *White* v. *Bird,* 45 Kansas, 759.

UNITED STATES *v.* POWELL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 63. Submitted January 8, 1909.—Decided January 11, 1909.

Judgment of the Circuit Court sustaining demurrer to indictment for conspiracy in alleged violation of §§ 5508, 5509, Rev. Stat., affirmed, without opinion, on the authority of *Hodges* v. *United States,* 203 U. S. 1.

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The Attorney General and *Mr. Assistant Attorney General Fowler* for the United States.

There was no appearance or brief filed for defendant in error.

Per Curiam: The judgment is affirmed on the authority of *Hodges* v. *United States*, 203 U. S. 1.

MR. JUSTICE MOODY did not sit.

SPOKANE VALLEY LAND & WATER COMPANY v. MADSON.

SAME v. SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Nos. 202, 231. Motion to dismiss.—Submitted January 18, 1909.—Decided January 25, 1909.

Writs of error to review judgments of the Supreme Court of the State of Washington, 40 Washington, 414; *S. C.*, 91 Pac. Rep. 1, involving the right of a patentee of the United States to construct a dam across an arm of a lake in the State of Washington, dismissed for want of jurisdiction; plaintiff in error claiming such right under the Desert Land Act of March 3, 1877, c. 107, 19 Stat. 377, and defendant in error claiming that there was no Federal question, or if any existed, it was raised too late.

Mr. S. C. Hyde and *Messrs. Gallagher & Thayer* for defendants in error, in support of the motion.

Mr. Albert Allen for plaintiff in error, in opposition to the motion.

Per Curiam: Writs of error dismissed for want of jurisdiction. *Hardin* v. *Shedd*, 190 U. S. 508; *Mutual Life Insurance Co.* v.

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McGrew, 188 U. S. 291; *Hulbert* v. *City of Chicago*, 202 U. S. 275; *Spokane Land & Water Co.* v. *Madson*, 40 Washington, 414; *Same* v. *Same*, 91 Pac. Rep. 1.

FRESHMAN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 298. Motion to dismiss or affirm.—Submitted January 10, 1909.—Decided January 25, 1909.

Writ of error to review a judgment of conviction for liquor selling without having first paid the special Federal tax therefor, dismissed for want of jurisdiction. Plaintiff in error contended that the indictment was found on evidence improperly obtained.

The Attorney General and *The Solicitor General* in support of motion to dismiss.

No brief filed in opposition.

Per Curiam: Writ of error dismissed for want of jurisdiction. *Adams* v. *New York*, 192 U. S. 585; *Radford* v. *United States*, 129 Fed. Rep. 49; *McGregor* v. *United States*, 134 Fed. Rep. 187.

GOON SHUNG, *alias* NG SHUNG *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 85. Submitted January 14, 1909.—Decided January 25, 1909.

A judgment of the District Court of the United States, affirming an order of deportation of a Chinese person, affirmed without opinion.

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Plaintiff in error claimed to be entitled to trial by jury and that he had been denied due process of law.

Mr. Thomas J. Barry, Mr. Harry J. Jaquith and *Mr. Benjamin Dellheim* for plaintiff in error.

The Attorney General and *The Solicitor General* for defendant in error.

Per Curiam: Judgment affirmed. Act of September 13, 1888, 25 Stat. 476, § 13; Act of May 5, 1892, 27 Stat. 25, §§ 3, 6; Act of March 3, 1893, 28 Stat. 7, § 1; Treaty of 1904, 33 Stat. 2215; Act of April 27, 1904, 33 Stat. 394; *United States* v. *Lee Yen Tai*, 185 U. S. 213; *Chin Bak Kan* v. *United States*, 186 U. S. 193; *Lip Hop Fong* v. *United States*, 209 U. S. 453; *Fong Yue Ting* v. *United States*, 149 U. S. 698.

CONVERSE v. MINNESOTA THRESHER MFG. CO.

SAME v. FIRST NATIONAL BANK OF SUFFIELD.

ERROR TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

Nos. 75, 76. Argued January 14, 1909.—Decided January 25, 1909.

A judgment of the highest court of Connecticut, involving the liability of stockholders under provisions in the constitution of Minnesota, reversed on the authority of *Bernheimer* v. *Converse*, 206 U. S. 516.[1]

[1 The leading headnote in *Bernheimer* v. *Converse*, 206 U. S. 516, referred to, is as follows:

"The court in this case followed the judgment of the highest court of the State in determining that a corporation was not within the exception,

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Mr. Wm. Waldo Hyde and *Mr. Charles Welles Gross* for plaintiff in error.

No appearance for defendants in error.

Per Curiam: Judgments reversed with costs on the authority of *Bernheimer* v. *Converse*, 206 U. S. 516, and cases remanded for further proceedings in conformity to law.

VALDES *v.* MUNICH.

SAME *v.* WOOD.

SAME *v.* PERIANES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

Nos. 457, 473, 474. Motions to dismiss or affirm.—Submitted January 18, 1909.—Decided February 1, 1909.

Writs of error to the District Court of the United States for Porto Rico, dismissed for want of jurisdiction because the judgments sought to be reversed were each less than $5,000. Plaintiffs below were citizens of the United States and Porto Rico, and the defendant a citizen of Spain who filed pleas to the jurisdiction and claimed that by the over-

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constitutional and statutory, as to stockholders' liability in favor of certain classes of corporations. Where, as in Minnesota, stockholders' liability is fixed and measured by the constitution, a stockholder upon acquiring his stock incurs an obligation arising from the constitutional provisions, and as such capable of being enforced in the courts not only of that State but of another State and of the United States."]

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ruling of such pleas he had been denied rights under the treaty of Paris and laws of the United States.

Writ of error to review 3 Porto Rico, 251, 503, dismissed.

Mr. Willis Sweet for defendant in error in Nos. 457 and 473, and *Mr. Willis Sweet* and *Mr. Joseph Anderson, Jr.*, for defendant in error in No. 474, in support of the motion.

Mr. F. Kingsbury Curtis, Mr. John G. Carlisle and *Mr. Henry A. Stickney* in Nos. 457 and 474; *Mr. F. Kingsbury Curtis* and *Mr. Henry A. Stickney* in No. 473 for plaintiff in error, in opposition.

Per Curiam: Writs of error dismissed for want of jurisdictional amounts. Act of April 12, 1900, c. 191, 31 Stat. 77, §§ 34, 35; Act of March 2, 1901, c. 812, 31 Stat. 953, § 3; *Royal Insurance Company* v. *Martin*, 192 U. S. 149, 159; *Ortega* v. *Lara*, 202 U. S. 339; *Perez* v. *Fernandez*, 202 U. S. 80; *Garrozi* v. *Dastas*, 204 U. S. 64, 73.

In re DOWAGIAC MANUFACTURING CO.

Submitted January 25, 1909.—Decided February 1, 1909.

Petition for leave to file petition for mandamus to the Circuit Court of Appeals directing it to reinstate an appeal from the Circuit Court which had already been decided by such Court of Appeals, denied.

Mr. Fred L. Chappell, Mr. Morrison R. Waite and *Mr. Edmund Wetmore* for petitioner.

Per Curiam: Motion for leave to file a petition for a writ of mandamus denied.

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NOTLEY *v.* BROWN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 361. Motion to dismiss or affirm.—Submitted January 25, 1909.—Decided February 1, 1909.

Writ of error dismissed for want of jurisdiction, it appearing that the merits of the case had been finally determined by the Supreme Court of Hawaii before the passage of the act of March 3, 1905, c. 1465, 33 Stat. 1035, extending the jurisdiction here to review of cases from that court involving over five thousand dollars.

Mr. Aldis B. Browne, Mr. Alexander Britton, Mr. Henry Holmes and *Mr. W. L. Stanley* in support of the motion.

Mr. Robert M. Morse and *Mr. William M. Richardson* for plaintiffs in error.

Per Curiam: Writ of error dismissed. *Crawford* v. *Naller*, 111 U. S. 796; *Insurance Company* v. *Comstock*, 16 Wall. 258; *Notley* v. *Brown*, 208 U. S. 429.

Decisions on Petitions for Writs of Certiorari from October 12, 1908, *to February* 23, 1909.

No. 403. ROBERT A. GRAHAM, PETITIONER, *v.* THE OREGON RAILROAD & NAVIGATION COMPANY. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas D. Rambaut* and *Mr. C. Larue Munson* for petitioner. *Mr. Maxwell Evarts* for respondent.

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No. 404. CHARLES GRING, PETITIONER, *v.* CHESAPEAKE & DELAWARE CANAL COMPANY. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert H. Smith* and *Mr. Jacob France* for petitioner. *Mr. Andrew C. Gray* for respondent.

No. 411. SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* LEMON TOWNSEND. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. A. Henderson* and *Mr. Milton Humes* for petitioner. No appearance for respondent.

No. 414. RICHARD B. SHEPARD, PETITIONER, *v.* THE UNITED STATES. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank S. Bright* and *Mr. Jesse B. Roote* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 415. ERIC P. SWENSON ET AL., PETITIONERS, *v.* JOHN W. CUNNINGHAM ET AL. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. S. Burleson* for petitioners. *Mr. Henry Sayles* for respondents.

No. 417. WALTER S. SCOTT ET AL., PETITIONERS, *v.* AUGUSTUS L. ABBOTT, TRUSTEE, ETC. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joseph S. Laurie*

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and *Mr. Frederick N. Judson* for petitioners. *Mr. Lee W. Grant, Mr. B. Schnurmacher, Mr. Leo Rassieur* and *Mr. B. P. Kennedy* for the respondent.

No. 418. THE UNITED STATES, PETITIONER, *v.* ISAAC STEPHENSON ET AL., AS EXECUTORS AND TRUSTEES, ETC. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Alfred L. Cary* for respondents.

No. 419. GEORGE F. DUNBAR ET AL., PETITIONERS, *v.* DAVID H. CASCADEN. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. C. Campbell* and *Mr. W. H. Metson* for petitioners. *Mr. Hayden Johnson* for respondent.

No. 420. ALABAMA NATIONAL BANK OF BIRMINGHAM ET AL., PETITIONERS, *v.* MASSASOIT-POCASSET NATIONAL BANK OF FALL RIVER, MASS. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John B. Knox* for petitioners. *Mr. Richard W. Walker* for respondent.

No. 455. W. A. GAINS & CO., PETITIONER, *v.* MAX KAHN, ADMINISTRATOR, ETC., ET AL. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John G. Carlisle, Mr. J. L.*

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Hopkins and *Mr. Daniel W. Lindsey* for petitioner. *Mr. Jacob Klein* and *Mr. Warwick M. Hough* for respondents.

No. 464. H. FRANKLIN SCHLEGEL, COMMITTEE, ETC., PETITIONER, *v.* THE UNION STOCKYARDS BANK OF BUFFALO, N. Y., ET AL. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Guy E. Farquhar* for petitioner. *Mr. John A. VanArsdale* for respondents.

No. 541. JAMES MCCAULLEY, ETC., PETITIONER, *v.* AMERICAN DREDGING COMPANY ET AL. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John F. Lewis* for petitioner. *Mr. Edward F. Pugh* and *Mr. Edward S. Dodge* for respondents.

No. 542. ATLANTIC TRUST AND DEPOSIT COMPANY, PETITIONER, *v.* THE TOWN OF LAURINBURG, N. C. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Floyd Hughes* for petitioner. *Mr. James E. Shepherd* and *Mr. Maxcy L. John* for respondent.

No. 548. JOHN W. AUCHINCLOSS ET AL., PETITIONERS, *v.* CONSTANTINE & PICKERING STEAMSHIP COMPANY, OWNERS, ETC.; No. 549. JOHN W. AUCHINCLOSS ET AL., PETITIONERS, *v.* CONSTANTINE & PICKERING STEAMSHIP COMPANY, OWNERS, ETC.; and No. 550. JOHN W. AUCHINCLOSS ET AL., PETITIONERS,

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v. W. McLEAN ET AL., OWNERS, ETC. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George H. Emerson* for petitioners. *Mr. J. Parker Kirlin* for respondents.

No. 555. BERRY BROS., LIMITED, PETITIONER, *v.* THE STEAMSHIP ST. QUENTIN, ETC. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George H. Emerson* for petitioner. *Mr. J. Parker Kirlin* and *Mr. John M. Woolsey* for respondent.

No. 556. HENRY P. SCOTT ET AL., PETITIONERS, *v.* QUEEN ANNE'S RAILROAD COMPANY ET AL. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John G. Johnson* and *Mr. Nicholas P. Bond* for petitioners. *Mr. John C. Rose* and *Mr. E. P. Keech, Jr.*, for respondents.

No. 557. RAINY LAKE RIVER BOOM CORPORATION, PETITIONER, *v.* RAINY RIVER LUMBER COMPANY, LIMITED. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Halvor Steenerson, Mr. Charles Loring* and *Mr. Samuel Herrick* for petitioner. *Mr. Chelsea J. Rockwood* and *Mr. A. Y. Merrill* for respondent.

No. 477. DIAMOND RUBBER COMPANY OF NEW YORK, PETITIONER, *v.* CONSOLIDATED RUBBER TIRE COMPANY ET AL. Octo-

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ber 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Charles K. Offield* for petitioner. *Mr. Charles W. Stapleton*, *Mr. T. W. Bakewell* and *Mr. F. P. Fish* for respondents.

No. 547. DR. MILES MEDICAL COMPANY, PETITIONER, *v.* JOHN D. PARK & SONS COMPANY. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Frank F. Reed* for petitioner. No appearance for respondent.

No. 571. THE UNITED STATES, PETITIONER, *v.* CARL S. CHAMBERLIN ET AL., EXECUTORS, ETC. October 19, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Peter H. Holme* for respondents.

No. 572. MAYER ZEIGER, PETITIONER, *v.* PENNSYLVANIA RAILROAD COMPANY. October 26, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. A. S. Worthington* and *Mr. A. Leo Weil* for petitioner. *Mr. M. W. Acheson, Jr.*, for respondent.

No. 584. GEORGE D. BRYAN, COLLECTOR, ETC., PETITIONER, *v.* ROXANA S. KER, EXECUTRIX, ETC. November 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *The Attorney*

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General and *The Solicitor General* for petitioner. *Mr. J. P. K. Bryan* and *Mr. M. C. Butler* for respondent.

No. 512. WINNISIMMET COMPANY, PETITIONER, *v.* MARY L. DAVENPORT ET AL. November 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Edward E. Blodgett* and *Mr. Arthur P. Teele* for petitioner. *Mr. William A. Davenport* for respondents.

No. 537. WILLARD N. JONES ET AL., PETITIONERS, *v.* THE UNITED STATES. November 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Martin L. Pipes* and *Mr. Samuel B. Huston* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

No. 545. L. T. JOHNSTON, PETITIONER, *v.* H. D. SEXTON ET AL. November 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward C. Kramer* for petitioner. *Mr. Charles P. Wise* for respondents.

No. 546. GEORGE WESTINGHOUSE ET AL., PETITIONERS, *v.* PHILIP HEIN ET AL. November 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles P. Abbey, Mr. Thomas W. Bakewell* and *Mr. J. Snowden Bell* for petitioners. *Mr. L. S. Bacon* and *Mr. Walter H. Chamberlin* for respondents.

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No. 590. SARAH O. DEVOU, PETITIONER, *v.* THE CITY OF CINCINNATI. November 9, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Fred W. Kean* for petitioner. *Mr. Geoffrey Goldsmith* and *Mr. Edward M. Ballard* for respondent.

No. 596. THE BALTIMORE REFRIGERATING & HEATING COMPANY OF BALTIMORE CITY, PETITIONER, *v.* FRANK G. WETZEL ET AL., ETC. November 9, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George Whitelock* and *Mr. Robert H. Smith* for petitioner. *Mr. W. Calvin Chesnutt* and *Mr. Charles Markell, Jr.*, for respondents.

No. 382. WALTER GRESHAM, PETITIONER, *v.* ARABELLA D. HUNTINGTON ET AL., AS EXECUTORS, ETC. November 16, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James B. Stubbs* and *Mr. T. D. Gresham* and *Mr. Walter Gresham* for petitioner. *Mr. R. S. Lovett, Mr. Maxwell Evarts* and *Mr. J. W. Terry* for respondents.

No. 582. THE BUTLER BROS. SHOE COMPANY, PETITIONER, *v.* UNITED STATES RUBBER COMPANY. November 16, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles J. Hughes, Jr.*, for petitioner. *Mr. Henry T. Rogers* for respondent.

No. 606. THE GENERAL FIREPROOFING COMPANY, PETITIONER, *v.* THE EXPANDED METAL COMPANY. November 16,

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1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. George H. Christy, Mr. Thomas W. Bakewell* and *Mr. James K. Bakewell* for petitioner. *Mr. Ernest Howard Hunter* for respondent.

No. 488. KOMADA & CO., PETITIONER, *v.* THE UNITED STATES. November 30, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. John M. Thurston, Mr. Thomas Fitch, Mr. J. J. Dunne* and *Mr. W. Wickham Smith* for petitioner. *The Attorney General, The Solicitor General* and *Mr. J. C. McReynolds* for respondent.

No. 597. E. M. DELK, PETITIONER, *v.* ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY. November 30, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Frederic D. McKenney* and *Mr. L. M. Walter* for petitioner. *Mr. W. F. Evans* for respondent.

No. 625. W. J. MURRAY ET AL., ETC., PETITIONERS, *v.* WILSON DISTILLING COMPANY ET AL. December 7, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. B. L. Abney, Mr. W. F. Stevenson, Mr. J. Fraser Lyon* and *Mr. D. W. Rountree* for petitioners. *Mr. T. Moultrie Mordecai, Mr. Alfred S. Barnard* and *Mr. Frank Carter* for respondents.

No. 627. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, PETITIONER, *v.* ERASTUS W. WILLARD, ADMINISTRATOR,

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ETC. December 7, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Albert J. Hopkins* for petitioner. *Mr. Arthur J. Eddy* and *Mr. E. C. Wetten* for respondent.

No. 632. JOHN F. KLUMPP ET AL., ETC., PETITIONERS, *v.* C. WESLEY THOMAS. December 7, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry J. Webster* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

No. 454. GEORGE CLOUGH, PETITIONER, *v.* GRAND TRUNK WESTERN RAILWAY COMPANY. December 14, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. H. Hatch* for petitioner. *Mr. Harrison Geer* for respondent.

No. 628. THE UNITED STATES, PETITIONER, *v.* THE STANDARD OIL COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF INDIANA. January 4, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *The Attorney General, The Solicitor General, Mr. Frank B. Kellogg, Mr. E. W. Sims* and *Mr. James H. Wilkerson* for petitioner. *Mr. John S. Miller, Mr. Moritz Rosenthal* and *Mr. Alfred D. Eddy* for respondent.

No. 634. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA

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RY. CO. ET AL., PETITIONERS, *v.* THE UNITED STATES. January 4, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas Wilson* for petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant to the Attorney General Ellis* for respondent.

No. 641. JOHN F. MONTGOMERY, MANAGING OWNER, ETC., ET AL., PETITIONERS, *v.* C. W. CHATFIELD, MASTER, ETC. January 4, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Edward E. Blodgett, Mr. R. G. Bickford* and *Mr. Frederick W. Eaton* for petitioners. *Mr. Robert M. Hughes* and *Mr. James D. Dewell, Jr.*, for respondent.

No. 650. DELAWARE SEAMLESS TUBE COMPANY ET AL., PETITIONERS, *v.* SHELBY STEEL TUBE COMPANY. January 4, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles K. Offield* for petitioners. *Mr. Thomas W. Bakewell* and *Mr. L. S. Bacon* for respondent.

No. 657. BURN LINE, LTD., PETITIONER, *v.* THE UNITED STATES AND AUSTRALASIA STEAMSHIP COMPANY. January 4, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. I. Parker Kirlin* for petitioner. *Mr. Harrington Putnam* for respondent.

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No. 583. HENRY SCHODDE, PETITIONER, *v.* TWIN FALLS LAND & WATER COMPANY. January 11, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Joseph R. Webster* for petitioner. *Mr. Edward B. Critchlow* for respondent.

No. 652. JAMES HAMILTON LEWIS ET AL., PETITIONERS, *v.* THE ALTON WATER COMPANY. January 11, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. E. N. Zoline* and *Mr. James Hamilton Lewis* for petitioners. *Mr. William Burry* and *Mr. Levi Davis* for respondent.

No. 658. JOHN N. SHACKELFORD, PETITIONER, *v.* ELWOOD D. FULTON. January 11, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert G. Linn* for petitioner. No appearance for respondent.

No. 645. WILLIAMSBURGH CITY FIRE INSURANCE COMPANY OF BROOKLYN, N. Y., PETITIONER, *v.* LEON WILLARD, DOING BUSINESS UNDER THE FIRM NAME OF LEON WILLARD & COMPANY. January 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. C. VanNess* and *Mr. Joseph H. Choate* for petitioner. *Mr. E. S. Pillsbury* for respondent. *Mr. Charles S. Wheeler* and *Mr. J. F. Bowie* filed a brief as *amici curiæ*.

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No. 659. GEORGE E. BABCOCK ET AL., PETITIONERS, *v.* ANNA M. DEMOTT ET AL. January 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Milton Brown* for petitioners. No appearance for respondents.

No. 664. J. N. BEAN ET AL., PETITIONERS, *v.* W. A. MORRIS ET AL. January 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Thomas J. Walsh* for petitioner. *Mr. N. W. McConnell, Mr. Andrew Wilson* and *Mr. Noel W. Barksdale* for respondents.

No. 675. WILLIAM CROZIER, PETITIONER, *v.* FRIED KRUPP AKTIENGESELLSCHAFT. January 25, 1909. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. William A. Jenner* for respondent.

No. 683. JOSEPH N. CARPENTER ET AL., PETITIONERS, *v.* DAVID J. WINN. January 25, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. John R. Abney* for petitioners. *Mr. John W. Boothby* for respondent.

No. 679. J. A. SCRIVEN COMPANY, PETITIONER, *v.* RICE-STIX DRY GOODS COMPANY; No. 680. J. A. SCRIVEN COMPANY, PETITIONER, *v.* THE PREMIUM MANUFACTURING COMPANY; and No. 681. J. A. SCRIVEN COMPANY, PETITIONER, *v.* FERGUSON-

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McKINNEY DRY GOODS COMPANY. February 1, 1909. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Arthur v. Briesen* for petitioner. *Mr. Montague Lyon* and *Mr. Frederick W. Lehmann* for respondents in Nos. 679 and 680. *Mr. Samuel S. Watson* for respondent in No. 681.

No. 684. TIMOTHY McCARTHY ET AL., PETITIONERS, *v.* THE BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY ET AL. February 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. T. Stoll* and *Mr. W. C. Jones* for petitioners. *Mr. C. W. Beale* for respondents.

No. 694. HUGH R. HEALY, PETITIONER, *v.* THE SUN COMPANY, OWNER, ETC. February 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William J. Wallace* and *Mr. Frederick M. Brown* for petitioner. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for respondent.

No. 698. JAMES RUDOLPH GARFIELD, SECRETARY, ETC., PETITIONER, *v.* THE UNITED STATES, EX REL. HARVEY SPALDING; No. 699. JAMES RUDOLPH GARFIELD, SECRETARY, ETC., PETITIONER, *v.* THE UNITED STATES, EX REL. JAMES H. SPALDING; and No. 700. JAMES RUDOLPH GARFIELD, SECRETARY, ETC., PETITIONER, *v.* THE UNITED STATES, EX REL. EDWIN W. SPALDING. February 1, 1909. Petitions for writs of certiorari to the Court of Appeals of the District of Columbia denied. *The Attorney General, The Solicitor General* and *Mr. Assistant*

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Attorney General Wooodruff for petitioner. No appearance for respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM OCTOBER 12, 1908, TO FEBRUARY 23, 1909.

No. 576. IN THE MATTER OF WILLIAM BUCKLEY, APPELLANT. Appeal from the Circuit Court of the United States for the Northern District of California. October 13, 1908. Docketed and dismissed on motion of *Mr. Frederick S. Tyler* for the appellee. *Mr. Frederick S. Tyler* and *Mr. U. S. Webb* for appellee. No one opposing.

No. 1: C. F. AINSWORTH ET AL., INTERVENORS, APPELLANTS, *v.* JOHN M. EVANS ET AL. Appeal from the Supreme Court of the Territory of Arizona. October 13, 1908. Dismissed with costs on motion of counsel for the appellants. *Mr. James H. Beal* for appellants. *Mr. Walter Bennett* for appellees.

No. 105. AMERICAN FELT COMPANY, PLAINTIFF IN ERROR, *v.* GARRETT W. SCOLLARD, COLLECTOR OF TAXES OF BOSTON, MASS. In error to the Supreme Judicial Court of the State of Massachusetts. October 13, 1908. Dismissed per stipulation. *Mr. Hollis R. Bailey* for plaintiff in error. *Mr. Thomas M. Babson* for defendant in error.

No. 132. MICHAEL ENDERS ET AL., PLAINTIFFS IN ERROR, *v.* JOHN FRIDAY, AS MAYOR OF THE CITY OF NORFOLK, NEB., ET AL. In error to the Supreme Court of the State of Nebraska. Octo-

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ber 13, 1908. Dismissed with costs on the authority of counsel for the plaintiffs in error. *Mr. William V. Allen* for plaintiffs in error. No appearance for defendants in error.

No. 140. J. P. LOONEY, PLAINTIFF IN ERROR, *v.* STATE OF MISSOURI. In error to the Supreme Court of the State of Missouri. October 13, 1908. Dismissed with costs on the authority of counsel for the plaintiff in error. *Mr. Timothy J. Fell* for plaintiff in error. No appearance for defendant in error.

No. 161. JOHN F. SHOREY, PLAINTIFF IN ERROR, *v.* THE STATE OF OREGON. In error to the Supreme Court of the State of Oregon. October 13, 1908. Dismissed with costs on the authority of counsel for the plaintiff in error. *Mr. William T. Muir* for plaintiff in error. *Mr. A. M. Crawford* for defendant in error.

No. 256. THE FIRST NATIONAL BANK OF LEXINGTON, PLAINTIFF IN ERROR, *v.* S. W. HAGAR, AUDITOR OF PUBLIC ACCOUNTS, ET AL., ETC. In error to the Court of Appeals of the State of Kentucky. October 13, 1908. Dismissed with costs on the authority of counsel for the plaintiff in error. *Mr. James T. Shelby*, *Mr. Joseph D. Hunt* and *Mr. George R. Hunt* for plaintiff in error. *Mr. James Breathitt* for defendants in error.

No. 209. MACANDREWS AND FORBES COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES; and No. 210. J. S. YOUNG COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Circuit Court of the United States for the Southern District of New York. October 13, 1908. Dismissed on the authority of counsel for the plaintiffs in error. *Mr. James*

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Parker and *Mr. DeLancey Nicoll* for plaintiffs in error. *The Attorney General* for defendant in error.

No. 18. HUNTER M. MERIWETHER ET AL., PLAINTIFFS IN ERROR, *v.* ANNIE B. WOOD ET AL. In error to the Supreme Court of the State of Kansas. October 22, 1908. Dismissed with costs on motion of counsel for the plaintiffs in error. *Mr. Frank Doster* for plaintiffs in error. No appearance for defendants in error.

Nos. 585, 586, 587, 588 and 589. JOAQUIN CELIS, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. October 29, 1908. Docketed and dismissed on motion of *Mr. Solicitor General Hoyt* for the defendant in error. *The Attorney General* and *The Solicitor General* for defendant in error. No one opposing.

No. 530. JOHN J. HEMPHILL AND KENNETH S. MURCHISON, APPELLANTS, *v.* THE UNITED STATES AND THE CHEROKEE NATION. Appeal from the Court of Claims. November 2, 1908. Appeal dismissed on motion of counsel for appellants. *Mr. John J. Hemphill* for appellants. *The Attorney General* for appellee.

No. 11. GEORGE A. TREADWELL ET AL., APPELLANTS, *v.* GEORGE O. MARRS. Appeal from the Supreme Court of the Territory of Arizona. November 4, 1908. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles M. Demond* for appellants. *Mr. T. G. Norris* and *Mr. John M. Ross* for appellee.

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No. 4. THE UNITED STATES, APPELLANT, *v.* THE MOUNTAIN COPPER COMPANY, LIMITED. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. November 9, 1908. Dismissed per stipulation, on motion of *Mr. Solicitor General Hoyt* for the appellant. *The Attorney General, The Solicitor General,* and *Mr. Ligon Johnson* for appellant. *Mr. W. S. Goodfellow* and *Mr. Charles P. Eells* for appellee.

No. 618. JOSE MARIA UBARRI E YRAMATEGUI, APPELLANT, *v.* PABLO UBARRI E YRAMATEGUI ET AL. Appeal from the District Court of the United States for Porto Rico. November 16, 1908. Docketed and dismissed with costs, on motion of *Mr. John Maynard Harlan* for the appellees. *Mr. John Maynard Harlan* for appellees. No one opposing.

No. 619. ANGELO SCHNEIDER, PLAINTIFF IN ERROR, *v.* AMERICAN BRIDGE COMPANY OF NEW YORK. In error to the Court of Appeals of the District of Columbia. November 16, 1908. Docketed and dismissed with costs, on motion of *Mr. Reginald S. Huidekoper* for the defendant in error. *Mr. Reginald S. Huidekoper* for defendant in error. No one opposing.

No. 46. SHERIDAN KIRK CONTRACT COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the District Court of the United States for the Southern District of Ohio. December 3, 1908. Dismissed pursuant to the tenth rule. *Mr. D. T. Watson* for plaintiff in error. *The Attorney General* for defendant in error.

No. 444. JOHN S. HORD, COLLECTOR OF INTERNAL REVENUE,

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ETC., PLAINTIFF IN ERROR, *v.* J. CASANOVAS. In error to the Supreme Court of the Philippine Islands. December 14, 1908. Dismissed with costs, on motion of *Mr. Solicitor General Hoyt* for the plaintiff in error. *The Attorney General* for plaintiff in error. No appearance for defendant in error.

No. 68. SAMUEL B. HARTMAN, PETITIONER, *v.* JOHN D. PARK & SONS COMPANY. On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. December 21, 1908. Dismissed with costs, on motion of counsel for the petitioner. *Mr. Frank F. Reed* for petitioner. *Mr. Wm. J. Shroder* and *Mr. Alton B. Parker* for respondent.

No. 79. BESSIE E. STEPP ET AL., APPELLANTS, *v.* THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY. Appeal from the Circuit Court of the United States for the Western District of Missouri. January 4, 1909. Dismissed per stipulation. *Mr. William C. Scarritt* for appellants. *Mr. M. A. Low* for appellee.

No. 251. CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, APPELLANT, *v.* CITY OF LOUISVILLE, KENTUCKY. Appeal from the Circuit Court of the United States for the Western District of Kentucky. January 4, 1909. Dismissed with costs, on motion of counsel for appellant. *Mr. David W. Fairleigh* for appellant. No appearance for appellee.

No. 296. H. V. MERCER ET AL., TRUSTEES IN BANKRUPTCY, ETC., APPELLANTS, *v.* ANDREW G. DUNLOP, TRUSTEE IN BANK-

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RUPTCY, ETC. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. January 4, 1909. Dismissed per stipulation. *Mr. M. H. Boutelle* for appellants. *Mr. Hector Baxter* for appellee.

No. 378. R. FLORES MAGON ET AL., APPELLANTS, *v.* THE UNITED STATES. Appeal from the Circuit Court of the United States for the Southern District of California. January 4, 1909. Dismissed pursuant to the tenth rule. *Mr. Halvor Steenerson* for appellants. *The Attorney General* and *The Solicitor General* for appellee.

No. 371. JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR, *v.* THE UNITED STATES EX REL. BENJAMIN F. VAUGHAN, GUARDIAN, ETC.; No. 372. JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR, *v.* THE UNITED STATES EX REL. EDWARD A. VAUGHAN; No. 373. JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR, *v.* THE UNITED STATES EX REL. BENJAMIN F. VAUGHAN; and No. 374. JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR, *v.* THE UNITED STATES EX REL. AMBROSE L. RICE. In error to the Court of Appeals of the District of Columbia. January 18, 1909. Dismissed with costs on motion of *Mr. Solicitor General Hoyt* for the plaintiff in error. *The Attorney General* for plaintiff in error. *Mr. Charles J. Kappler, Mr. Charles H. Merillat, Mr. James K. Jones* and *Mr. Charles M. Fechheimer* for defendants in error in Nos. 371, 372 and 373. No appearance for defendant in error in No. 374.

No. 94. MARCELO LEANO ET AL., PLAINTIFFS IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the

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Philippine Islands. January 21, 1909. Dismissed pursuant to tenth rule. *Mr. A. B. Browne* and *Mr. Alexander Britton* for plaintiffs in error. *The Attorney General* for defendant in error.

No. 617. H. V. MERCER ET AL., TRUSTEES, ETC., APPELLANTS, *v.* MONITOR DRILL COMPANY. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. February 23, 1909. Dismissed per stipulation. *Mr. M. H. Boutelle* for appellants.

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INDEX.

ACTIONS.

1. *Against United States—Right of action for destruction or taking of property under Tucker Act.*

No action can be maintained against the United States for the destruction or taking of property under the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, unless the United States is bound by express or implied contract to compensate the owner therefor or unless the case be one not sounding in tort. *Juragua Iron Co.* v. *United States*, 297.

2. *Application of* § 10, *act of March* 11, 1902.

The application of § 10 of the act of March 11, 1902, 32 Stat. 68, c. 183, is not limited to local actions described in § 8 of the act of March 3, 1875, c. 137, 18 Stat. 470. *Matter of Dunn*, 374.

See Bonds, 3, 4;
Corporations, 1, 2;
Jurisdiction, C 2;
Lis Pendens;
Public Officers, 3;
Rate Regulation, 15;
Removal of Causes;
War, 2.

ACTS OF CONGRESS.

Anti-Trust Act of July 2, 1890 (see Anti-Trust Act): *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 227.

Bankruptcy Act of July 1, 1898 (see Clerks of Court): *United States* v. *Marvin*, 275. Section 24*b* (see Jurisdiction, A 20): *F. L. Grant Shoe Co.* v. *Laird*, 445. Section 59*b* (see Bankruptcy): *F. L. Grant Shoe Co.* v. *Laird*, 445.

Civil Rights, Rev. Stat. § 1979 (see Jurisdiction, C 2): *Moyer* v. *Peabody*, 78.

Claims Against United States, Act of March 3, 1887 (see Statutes, A 8; War, 2): *Juragua Iron Co.* v. *United States*, 297. Act of March 3, 1863, § 9 (see Statutes, A 8): *Ib.* Rev. Stat. § 1066: *Ib.*

Clerks of Court, Rev. Stat. §§ 574, 638, 828 (see Clerks of Court): *United States* v. *Marvin*, 275.

Columbia River, Acts of March 2, 1853, and February 14, 1859 (see States, 3): *Nielsen* v. *Oregon*, 315.

Conspiracy, Rev. Stat. § 5440 (see Criminal Law, 2, 3; Jury and

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Jurors, 4): *Crawford* v. *United States*, 183. Rev. Stat. §§ 5508, 5509 (see Criminal Law, 4): *United States* v. *Powell*, 564.

DESERT LAND ACT of March 3, 1877 (see Jurisdiction, A 13): *Spokane Val. Land & Water Co.* v. *Madson*, 565.

INDICTMENTS, Rev. Stat. § 1025 (see Criminal Law, 5): *New York Central R. R. Co.* v. *United States*, 481.

INTERSTATE COMMERCE, Act of February 4, 1889 (see Interstate Commerce, 2): *American Express Co.* v. *United States*, 522. Elkins Act of February 19, 1903 (see Interstate Commerce): *New York Central R. R.* v. *United States*, 481, 500; *American Express Co.* v. *United States*, 522. Hepburn Act of June 29, 1903 (see Interstate Commerce): *American Express Co.* v. *United States*, 522.

JUDICIAL DISTRICTS, Act of March 11, 1902, § 10 (see Actions, 2): *Matter of Dunn*, 374.

JUDICIARY, Act of March 3, 1891 (see Judgments and Decrees, 2): *Bagley* v. *General Fire Extinguisher Co.*, 477. Secs. 4, 5 (see Jurisdiction, A 19): *F. L. Grant Shoe Co.* v. *Laird*, 445. Sec. 5, c. 3, as amended by act of July 20, 1897 (see Jurisdiction, A 17, 18): *Rakes* v. *United States*, 55. Act of March 3, 1905, c. 1465 (see Jurisdiction, A 29): *Notley* v. *Brown*, 570. Act of March 3, 1905, § 12 (see Appeal and Error, 2): *Laurel Oil Co.* v. *Morrison*, 291. Act of March 10, 1908 (see Certificate of Probable Cause; Jurisdiction, A 16): *Bilik* v. *Strassheim*, 551; *Ex parte Patrick*, 555. Rev. Stat. § 629 (see Jurisdiction, C 2): *Moyer* v. *Peabody*, 78. Rev. Stat. § 709 (see Jurisdiction, A 3): *North Shore Boom Co.* v. *Nicomen Boom Co.*, 406; (see Jurisdiction, A 4): *American Express Co.* v. *Mullins*, 311; (see Jurisdiction, A 5): *Thomas* v. *Texas*, 278; (see Jurisdiction, A 6): *Waters-Pierce Oil Co.* v. *Texas*, 86; (see Jurisdiction, A 8): *Thornton* v. *Natchez*, 559.

MINES AND MINING, Rev. Stat. § 2322 (see Mines and Mining, 1): *Bradford* v. *Morrison*, 389.

NAVY, Rev. Stat. § 1624 (see Courts-Martial, 1, 2): *Mullan* v. *United States*, 516.

PHILIPPINE ISLANDS, Organic Act of July 1, 1902 (see Philippine Islands, 2): *Cariño* v. *Insular Government*, 449.

REMOVAL OF CAUSES, Act of March 3, 1875, § 8 (see Actions, 2): *Matter of Dunn*, 374.

RIVER AND HARBOR ACTS of March 3, 1899, § 10, and Sept. 19, 1890, § 7 (see Jurisdiction, A 3): *North Shore Boom Co.* v. *Nicomen Boom Co.*, 406.

SUITS AGAINST UNITED STATES, Tucker Act of March 3, 1887 (see Actions, 1): *Juragua Iron Co.* v. *United States*, 297.

TRADE-MARK ACT of February 20, 1905 (see Jurisdiction, A 22): *Atkins* v. *Moore*, 285.

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ADMIRALTY.

Jurisdiction of libel.

The judgment of the admiralty court dismissing for want of jurisdiction a libel against a vessel for damages to a pipe on the bottom of the Hudson River, affirmed without opinion. *Phœnix Const. Co.* v. *Central Hudson S. Co.*, 558.

See MARITIME LAW.

AGENTS.

See ATTORNEY AND CLIENT.

ALIEN ENEMIES.

See WAR, 1.

AMENDMENTS TO CONSTITUTION.

Fourteenth. See CONSTITUTIONAL LAW.

AMOUNT IN CONTROVERSY.

See JURISDICTION, A 1, 2, 26; C 1, 3.

ANTI-TRUST ACT.

1. *Illegal combination within meaning of.*

Where a number of manufacturers situated in different States engaged in manufacturing an article sold in different States, organize a selling company through which their entire output is sold, in accordance with an agreement between themselves, to such persons only as enter into a purchasing agreement by which their sales are restricted, the effect is to restrain and monopolize interstate and foreign trade and commerce and is illegal under the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209; and so held in regard to a combination of wall paper manufacturers. *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 227.

2. *Determination of whether contract within prohibition of.*

In determining whether a contract amounts to a combination in restraint of interstate trade in violation of the act of July 2, 1890, all the facts and circumstances will be considered. (*Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 247.) *Ib.*

ANTI-TRUST LAWS.

See CONSTITUTIONAL LAW, 4, 5, 11, 12;
STATES, 1.

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APPEAL AND ERROR.

1. *Office of writ of error and of appeal.*

Writ of error is the general, and appeal the exceptional, method of bringing cases to this court. The latter method is in the main confined to equity cases and the former is proper to bring up a judgment of the Supreme Court of the Philippine Islands affirming a judgment of the Court of Land Registration dismissing an application for registration of land. *Cariño* v. *Insular Government*, 449.

2. *Right to appeal or writ of error to this court in cases originating in United States courts in Indian Territory.*

The provisions in § 12 of the act of March 3, 1905, c. 1479, 33 Stat. 1081, for appeals and writs of error from the United States courts in Indian Territory to the United States Court of Appeals in the Indian Territory, and from that court to the United States Circuit Court of Appeals for the Eighth Circuit are exclusive; and there is now no appeal or writ of error in such cases from the Circuit Court of Appeals of the Eighth Circuit to this court. *Laurel Oil Co.* v. *Morrison*, 291.

3. *Right of appeal from decisions of Court of Appeals for Indian Territory.*

Decisions of the Court of Appeals of the United States for the Indian Territory are final except as made subject to review by some express statutory provision. *Ib.*

See COURTS, 10; JURISDICTION; COURTS-MARTIAL, 3; MANDAMUS, 3; JUDGMENTS AND DECREES, 4, 5; PRACTICE AND PROCEDURE, 3; STATUTES, A 7.

ARMY AND NAVY.

See COURTS-MARTIAL.

ARREST.

See PUBLIC OFFICERS, 3.

ASSESSMENT FOR TAXES.

See CONSTITUTIONAL LAW, 9, 10.

ASSIGNMENTS OF ERROR.

See PRACTICE AND PROCEDURE, 3.

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ATTORNEY AND CLIENT.

Agency of attorney to bind several parties—Presumption as to representation.

An attorney must be the agent of all to bind all; and a plaintiff charging a conspiracy between certain claimants and an administrator cannot satisfy the burden of proof which is on him to show that all conspired, by showing that the same person was attorney for several of the defendants, as no presumption exists that he was attorney for all from the fact that, as attorney for the administrator, he advised the payment of all the claims. *McDaniel* v. *Traylor*, 428.

See JURY AND JURORS, 2.

BANKRUPTCY.

1. *Provable claims on which petition for adjudication of bankruptcy can be based.*

Provable claims, on which a petition to have the debtor adjudicated a bankrupt under § 59*b* of the Bankruptcy Act can be based, are claims that can be proved in the proceedings, and a liquidation may be ordered on the filing of the petition to ascertain whether the petition is based on a provable claim. *F. L. Grant Shoe Co.* v. *Laird*, 445.

2. *Same.*

A provable claim may be based on the breach of an express warranty. *Ib.*

See DEBTS DUE UNITED STATES;
CLERKS OF COURT;
JURISDICTION, A 19, 20, 21.

BILL OF EXCEPTIONS.

See PRACTICE AND PROCEDURE, 1.

BILL OF LADING.

See CARRIERS, 4, 5.

BILL OF RIGHTS.

See PHILIPPINE ISLANDS, 4.

BONA FIDES.

See BONDS, 2.

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BONDS.

1. *Recitals, right of purchaser to rely upon; estoppel of obligor to assert contrary.*

Where the officers having statutory authority to issue bonds have also the statutory authority to determine whether conditions precedent have been performed, certify by recitals therein that the bonds are issued in virtue of the statute, such recitals import compliance with the statute upon which a *bona fide* purchaser can rely, and the obligor cannot against such a purchaser assert the contrary. (*Evansville* v. *Dennett*, 161 U. S. 434.) *Presidio County* v. *Noel-Young Bond Co.*, 58.

2. *Presumption of bona fides of purchaser.*

In the absence of evidence to the contrary the presumption is that a third party producing a genuine negotiable instrument is a *bona fide* purchaser for value. *Ib.*

3. *Interest coupons; suit on, not a suit on the bond.*

Although a coupon is for interest to become due on the bond the promises to pay are as distinct as though expressed in different instruments, and, as the bond and the coupons are capable of separate ownership, a suit on the bonds and a suit on the coupons are based on different causes of action. *Ib.*

4. *Right of holder to sue on bond not affected by judgment in suit on coupons to which he was not a party.*

A *bona fide* purchaser for value before maturity of bonds is not precluded or affected by an adverse judgment in a suit on the coupons of those bonds to which suit he is not a party and of which he had no notice. *Ib.*

See DEBTS DUE UNITED STATES.

BOOKS OF ACCOUNT.

See EVIDENCE, 5.

BURDEN OF PROOF.

When onus sufficiently met.

The party having the burden of proof is not entitled to a reversal because the jury was charged to find against him unless satisfied that he had clearly proved his case even though the word "clearly" be slightly overemphasized. (*Ward* v. *Cochran*, 150 U. S. 597.) *Spreckels* v. *Brown*, 208.

See ATTORNEY AND CLIENT; CARRIERS, 3, 4; RATE REGULATION, 15, 16; VERDICT, 1.

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CANAL ZONE.

1. *Writ of error to review judgment of the Supreme Court of the Canal Zone dismissed for want of jurisdiction.* Coulson v. Government of the Canal Zone, 553.

2. *Leave to file petition for habeas corpus by person sentenced by Supreme Court of Canal Zone denied.* Matter of Coulson, 553.

CAPITAL CRIMES.

See JURISDICTION, A 17.

CARRIERS.

1. *Duty to resist judicial process in respect of goods carried.*
The duty of the carrier to safely carry and promptly deliver to the consignee the goods entrusted to it does not require it to forcibly resist judicial proceedings in the courts of the State into or through which the goods are carried. *American Express Co.* v. *Mullins*, 311.

2. *Same.*
While the carrier may appear and contest the validity of a seizure under judicial process of goods in its custody, if it seasonably notify the owner and call upon him to defend, it is relieved from further responsibility; and, in absence of fraud or connivance on its part, it may plead the judgment rendered against it as a bar in an action brought by the owner. *Ib.*

3. *Vessels—Damage to goods—Liability of carrier—Burden of proof as to cause of damage.*
When goods which were received in good order on board a vessel under a bill of lading agreeing to deliver them, at termination of the voyage, in like good order and condition are damaged on the voyage, the burden is on the carrier to show that the damage was occasioned by a peril for which he was not responsible. (*Clark* v. *Barnwell*, 12 How. 272.) *The Folmina*, 354.

4. *Vessels—Proof that damage to cargo caused by peril of the sea.*
Merely proving that damage to cargo was by sea water does not establish that such damage was caused by peril of the sea within the exception of the bill of lading; in such a case conjecture cannot take the place of proof. (*The G. R. Booth*, 171 U. S. 450.) *Ib.*

5. *Vessels—Peril of the sea within meaning of bill of lading; admission of sea water as.*
The question "whether damage to the cargo of an apparently seaworthy ship, through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is

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of itself a sea peril within the meaning of an exception in a bill of lading exempting the carrier from the act of God . . . loss or damage from . . . explosion, heat or fire on board . . . risk of craft or hulk or transshipment, and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature and kind" answered in the negative. *Ib.*

See CONSTITUTIONAL LAW, 7, 8;
CORPORATIONS, 4;
INTERSTATE COMMERCE.

CASES APPROVED.

Gaines v. *Knecht & Son*, 27 App. D. C. 530, approved in *Atkins* v. *Moore*, 285.

Owen v. *United States*, 41 Ct. Cl. 69, approved in *United States* v. *Marvin*, 275.

CASES DISTINGUISHED.

American Smelting Co. v. *Colorado*, 204 U. S. 403, distinguished in *Hammond Packing Co.* v. *Arkansas*, 322.

Black v. *Elkhorn*, 163 U. S. 445, distinguished in *Bradford* v. *Morrison*, 389.

Cotton v. *Hawaii*, 211 U. S. 162, distinguished in *Spreckels* v. *Brown*, 208.

Hovey v. *Elliott*, 167 U. S. 409, distinguished in *Hammond Packing Co.* v. *Arkansas*, 322.

In re Heff, 197 U. S. 488, as explained in *In re Lincoln*, 202 U. S. 178, distinguished in *Toy Toy* v. *Hopkins*, 542.

Northern Pacific Railroad v. *Egeland*, 163 U. S. 93, distinguished in *Texas & Pacific Ry. Co.* v. *Bourman*, 536.

Shields v. *Coleman*, 157 U. S. 168, distinguished in *Palmer* v. *Texas*, 118.

CASES FOLLOWED.

Addyston Pipe Co. v. *United States*, 175 U. S. 211, followed in *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 227.

Allen v. *Southern Pacific Co.*, 173 U. S. 479, followed in *F. L. Grant Shoe Co.* v. *Laird*, 445.

American Sugar Refining Co. v. *United States*, 211 U. S. 155, followed in *Shaw* v. *United States*, 559.

Berea College v. *Kentucky*, 211 U. S. 45, followed in *New York Central R. R.* v. *United States*, 481.

Bernheimer v. *Converse*, 206 U. S. 516, followed in *Bernheimer* v. *Minnesota Thresher Mfg. Co.*, 567.

Brown v. *United States*, 171 U. S. 631, followed in *Laurel Oil Co.* v. *Morrison*, 291.

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Central Loan & Trust Co. v. *Campbell*, 173 U. S. 84, followed in *Hammond Packing Co.* v. *Arkansas*, 322.

Chapman v. *Bowen*, 207 U. S. 89, followed in *Clevenger* v. *Chaney*, 562.

Chicago, B. & Q. R. R. v. *Williams*, 205 U. S. 444, followed in *The Folmina*, 354.

C. H. Nichols Lumber Co. v. *Franson*, 203 U. S. 278, followed in *F. L. Grant Shoe Co.* v. *Laird*, 445.

Clark v. *Barnwell*, 12 How. 272, followed in *The Folmina*, 354.

Cochran v. *Montgomery County*, 199 U. S. 260, followed in *Matter of Dunn*, 374.

Cohens v. *Virginia*, 6 Wheat. 264, followed in *Willcox* v. *Consolidated Gas Co.*, 19.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, followed in *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 227.

Connors v. *United States*, 158 U. S. 408, followed in *New York Central R. R.* v. *United States*, 500.

Consolidated Rendering Co. v. *Vermont*, 207 U. S. 541, followed in *Hammond Packing Co.* v. *Arkansas*, 322.

Cummings v. *Chicago*, 188 U. S. 410, followed in *North Shore Boom Co.* v. *Nicomen Boom Co.*, 406.

Evansville v. *Dennett*, 161 U. S. 434, followed in *Presidio County* v. *Noel-Young Bond Co.*, 58.

Ex parte Young, 209 U. S. 123, followed in *Willcox* v. *Consolidated Gas Co.*, 19.

Farmers' Loan & Trust Co. v. *Lake St. Elec. Ry. Co.*, 177 U. S. 59, followed in *Palmer* v. *Texas*, 118.

Fauntleroy v. *Lum*, 210 U. S. 230, followed in *American Express Co.* v. *Mullins*, 311.

Frasch v. *Moore*, 211 U. S. 1, followed in *Johnson* v. *Mueser*, 283; *Atkins* v. *Moore*, 285; *Gaines* v. *Knecht*, 561.

Hale v. *Henkel*, 201 U. S. 43, followed in *Hammond Packing Co.* v. *Arkansas*, 322.

Hodges v. *United States*, 203 U. S. 1, followed in *United States* v. *Powell*, 564.

Kansas City Northwestern R. R. Co. v. *Zimmerman*, 210 U. S. 336, followed in *Abrams* v. *White*, 558.

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1, followed in *Willcox* v. *Consolidated Gas Co.*, 19.

Lake Shore & Michigan Southern R. R. v. *Prentice*, 147 U. S. 101, followed in *New York Central R. R.* v. *United States*, 481.

Lowber v. *Bangs*, 2 Wall. 728, followed in *Harten* v. *Löffler*, 397.

New York Central R. R. Co. v. *United States*, 212 U. S. 481, followed in *Same* v. *Same*, 500.

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Orleans v. *Platt*, 99 U. S. 676, followed in *Presidio County* v. *Noel-Young Bond Co.*, 58.

Osborn v. *Bank of United States*, 9 Wheat. 738, followed in *Matter of Dunn*, 374.

People's Bank v. *Calhoun*, 102 U. S. 256, followed in *Palmer* v. *Texas*, 118.

Ponce v. *Roman Catholic Church*, 210 U. S. 296, followed in *Santos* v. *Roman Catholic Church*, 463.

Potter v. *Hall*, 189 U. S. 292, followed in *Greenameyer* v. *Coate*, 434.

Powers v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, followed in *Fritzlen* v. *Boatmen's Bank*, 364.

Re Metropolitan Receivership, 208 U. S. 90, followed in *Willcox* v. *Consolidated Gas Co.*, 19.

San Diego Land and Town Co. Cases, 174 U. S. 739, 189 U. S. 439, followed in *Willcox* v. *Consolidated Gas Co.*, 19.

Schick v. *United States*, 195 U. S. 65, followed in *Mullan* v. *United States*, 516.

Spreckels Sugar Refining Co. v. *McClain*, 192 U. S. 397, followed in *Bagley* v. *General Fire Extinguisher Co.*, 477.

Sturgis v. *Boyer*, 24 How. 110, followed in *The Eugene F. Moran*, 466.

The G. R. Booth, 171 U. S. 450, followed in *The Folmina*, 354.

Tullis v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348, followed in *Pittsburg, Cinn., C. & St. Louis Ry. Co.* v. *Lightheiser*, 560.

United States v. *Finnell*, 185 U. S. 236, followed in *United States* v. *Marvin*, 275.

Vance v. *Burbank*, 101 U. S. 514, followed in *Greenameyer* v. *Coate*, 434.

Wabash Railroad v. *Adelbert College*, 208 U. S. 38, followed in *Palmer* v. *Texas*, 118.

Ward v. *Cochran*, 150 U. S. 597, followed in *Spreckels* v. *Brown*, 208.

Washington Gas Light Co. v. *Lansden*, 172 U. S. 334, followed in *New York Central R. R.* v. *United States*, 481.

Water, Light & Gas Co. v. *Hutchinson*, 207 U. S. 385, followed in *Same* v. *Same*, 555.

Wedding v. *Meyler*, 192 U. S. 573, followed in *Nielson* v. *Oregon*, 315.

Western Loan Co. v. *Butte & Boston Mining Co.*, 210 U. S. 368, followed in *Western Loan Co.* v. *Colorado Smelting & Mining Co.*, 556.

Wiborg v. *United States*, 163 U. S. 632, followed in *Crawford* v. *United States*, 183.

Williamette Iron Bridge Co. v. *Hatch*, 125 U. S. 1, followed in *North Shore Boom Co.* v. *Nicomen Boom Co.*, 406.

CASES NOT FOLLOWED.

Ball, Hutchings & Co. v. *Presidio County*, 88 Texas, 60, not followed in *Presidio County* v. *Noel-Young Bond Co.*, 58.

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CERTIFICATE OF PROBABLE CAUSE.

Appeal from judgment of Circuit Court denying habeas corpus dismissed for want of certificate of probable cause conformably to act of March 10, 1908, *c.* 76, 35 *Stat.* 40. Bilik *v.* Strassheim, 551; Ex parte Patrick, 555.

CERTIFIED QUESTIONS.

See PRACTICE AND PROCEDURE, 7, 8.

CHARGE TO JURY.

See INSTRUCTIONS TO JURY.

CHINESE EXCLUSION.

See IMMIGRATION.

CITIZENS.

See WAR.

CIVIL RIGHTS.

See JURISDICTION, C 2;
JURY AND JURORS, 6.

CLAIMS AGAINST UNITED STATES.

See STATUTES, A 8;
WAR, 2.

CLASSIFICATION.

See CONSTITUTIONAL LAW, 15, 16, 18, 20, 21.

CLERK OF COURT.

Compensation to which entitled; references to referee in bankruptcy.

The bankruptcy court of the United States is always open for the transaction of business whether the judge be personally present or not; and, under §§ 574, 638, 828, Rev. Stat., and chap. II, § 2 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 545, clerks of the United States courts are entitled to the *per diem* compensation for those days on which voluntary petitions in bankruptcy are referred to the referee during the absence of the judge. (*United States* v. *Finnell*, 185 U. S. 236, followed; *Owen* v. *United States* 41 C. Cl. 69, approved.) *United States* v. *Marvin*, 275.

COLLATERAL ATTACK.

See JUDGMENTS AND DECREES, 4, 5.

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COLLISION OF VESSELS.
See MARITIME LAW.

COLUMBIA RIVER.
See STATES, 3, 5.

COMBINATIONS IN RESTRAINT OF TRADE.
See ANTI-TRUST ACT; STATES, 2;
CONSTITUTIONAL LAW, 4; VENDOR AND VENDEE, 3.

COMMERCE.
See INTERSTATE COMMERCE.

COMMERCIAL LAW.
See COURTS, 18;
LIS PENDENS.

COMMISSIONER OF PATENTS.
See JURISDICTION, A 22, 23, 24.

COMMON CARRIERS.
See CARRIERS; CORPORATIONS, 4;
CONSTITUTIONAL LAW, 7, 8; INTERSTATE COMMERCE.

COMMON LAW.
See JURY AND JURORS, 2;
LOCAL LAW (DIST. OF COL.).

CONDEMNATION PROCEEDINGS.
See MANDAMUS, 1.

CONFISCATION.
See CONSTITUTIONAL LAW, 23;
COURTS, 4, 6;
RATE REGULATION.

CONFLICT OF COURTS.
See COURTS, 8, 9, 11, 12, 18.

CONGRESS.

I. ACTS OF.
See ACTS OF CONGRESS.

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II. POWERS OF.

To subject corporations to criminal prosecution.

Congress can impute to a corporation the commission of certain criminal offenses and subject it to criminal prosecution therefor. *New York Central R. R.* v. *United States*, 481.

See INTERSTATE COMMERCE, 1, 5;
JUDICIAL AND LEGISLATIVE FUNCTIONS.

CONSPIRACY

See ATTORNEY AND CLIENT; JURISDICTION, C 1;
CRIMINAL LAW, 2, 3, 4; JURY AND JURORS, 3, 4.

CONSTITUTIONAL LAW.

1. *Contract impairment—Revocation of permit to foreign corporation to do business within State.*

Where the state court has decided that the penal provisions of a statute relate to both domestic and foreign corporations, a foreign corporation cannot claim that the contract between it and the State admitting it, on payment of the franchise tax, to do business on the same terms as a domestic corporation has been impaired by the revocation of its permit for violation of such statute. *Am. Smelting Co.* v. *Colorado*, 204 U. S. 403, distinguished. *Hammond Packing Co.* v. *Arkansas*, 322.

2. *Due process of law; circumstances determinative of.*

What is due process of law depends on circumstances, and varies with the subject-matter and necessities of the situation. *Moyer* v. *Peabody*, 78.

3. *Due process of law—Conviction for acts tending or reasonably calculated to bring about thing prohibited, not denial of.*

Where defendant has had a fair trial and the question of liability has been submitted to a jury and the judgment reviewed and sustained by an appellate court, this court will not hold that there has been a deprivation of due process of law because the state statute permitted, and the court charged, that conviction could be had not only for acts accomplishing, but also for those tending or reasonably calculated to bring about, the things prohibited. *Waters-Pierce Oil Co.* v. *Texas* (*No.* 1), 86.

4. *Due process of law; validity of Texas anti-trust laws.*

The anti-trust laws of Texas involved in this case are not unconstitutional as depriving anyone of due process of law because vague and indefinite as prohibiting acts which "tend" or are "reasonably calculated" to restrain trade and prevent competition. *Ib.*

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5. *Due process of law; excessiveness of fine amounting to deprivation of property without.*

Where a state anti-trust law fixed penalties at $5,000 a day, and, after verdict of guilty for over 300 days, a defendant corporation was fined over $1,600,000, this court will not hold that the fine is so excessive as to amount to deprivation of property without due process of law where it appears that the business was extensive and profitable during the period of violation, and that the corporation has over $40,000,000 of assets and has declared dividends amounting to several hundred per cent. *Ib.*

6. *Due process of law; appointment, by state court, of receiver, on testimony taken in another suit.*

Procedure in matters under its jurisdiction is for the State and its courts to determine; and nothing in the Federal Constitution prevents a state court from acting in a proceeding for receivership of a corporation brought by the State on testimony taken in the suit by the State against the same corporation and on the judgment in which suit the receivership proceeding is based. *Waters-Pierce Oil Co.* v. *Texas* (*No.* 2), 112.

7. *Due process of law; deprivation of property—Validity of requirement as to use of cars by connecting carriers.*

A provision in the constitution of a State that a carrier must deliver its cars to connecting carriers without providing adequate protection for their return, or compensation for their use, amounts to a taking of property without due process of law within the meaning of the Fourteenth Amendment; and so held as to §§ 213, 214 of the constitution of Kentucky. *Louisville &c. R. R. Co.* v. *Stockyards Co.*, 132.

8. *Due process of law; deprivation of property—Validity of law respecting use of carrier's property by competing roads.*

The duty of a carrier to accept goods tendered at its station does not require it to accept cars offered by competing roads at arbitrary points near its terminus for the purpose of using its terminal station. A law requiring the carrier so to do is unconstitutional as taking property without due process of law. *Ib.*

9. *Due process of law—Sufficiency of description of property to sustain tax sale.*

Although a description may not be technically correct, if it identifies the land it will sustain a conveyance, or, as in this case, an assessment for taxes, and notice of sale therefor when delinquent; and, if the owner knows that the property so described is his, he is not,

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by reason of the deficient description, deprived of his property without due process of law. *Ontario Land Co.* v. *Yordy*, 152.

10. *Due process of law; deprivation of property; effect of tax sale where property assessed to unknown or other persons.*

Where, as in the State of Washington, tax proceedings are *in rem*, owners are bound to take notice thereof and to pay taxes on their property, even if assessed to unknown or other persons; and, if an owner stands by and sees the property sold for delinquent taxes, he is not thereby deprived of his property without due process of law. *Ib.*

11. *Due process of law—Validity of state statute requiring corporations to produce books and papers—Arkansas anti-trust law.*

A state statute requiring corporations to produce books and papers which has been construed by the highest court of the State to the effect that its requirements are satisfied by a *bona fide* effort to comply with its provisions or a reasonable showing of inability to comply therewith is not an arbitrary and unjust exercise of authority repugnant to the due process clause of the Fourteenth Amendment, and so held as to such provisions in the Arkansas anti-trust law. *Hammond Packing Co.* v. *Arkansas*, 322.

12. *Due process of law—Effect of order requiring corporation to produce books and papers in suit under state anti-trust law.*

An order made pursuant to statute in a suit for penalties for violations of a state anti-trust law requiring a corporation to produce books and papers does not deny due process of law because thereunder the State may elicit proof not only as to the liability of the corporation but also proof in its possession relevant to its defense. (*Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Hale* v. *Henkel*, 201 U. S. 43.) *Ib.*

13. *Due process of law; materiality of motive of State in acting under valid statute.*

If a state statute requiring the production of papers is constitutional the motive of the State for acting thereunder is immaterial. *Ib.*

14. *Due process of law—Effect to deny, of order striking out answer of corporation for refusal to produce evidence.*

A state statute requiring corporations to produce, and creating a presumption of fact as to bad faith and untruth of a defense by reason of suppression of material evidence, does not deny due process of law; nor does an order of the court based on such a statute striking out the answer of a defendant corporation which has refused to produce material evidence deny due process and condemn him

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unheard. *Hovey* v. *Elliott*, 167 U. S. 409, in which the order striking the answer from the files was in the nature of a punishment for contempt, distinguished. *Ib.*

See Infra, 24, 25; IMMIGRATION; COURTS, 7; RATE REGULATION, 6; STATES, 1.

15. *Equal protection of laws—Classification by State of corporations and individuals in respect of doing of business within its borders.*

The difference between the extent of the power which the State may exert over the doing of business within its borders by an individual, and that which it can exercise as to corporations, furnishes a distinction authorising a classification between the two which does not violate the equal protection clause of the Fourteenth Amendment. *Ib.*

16. *Equal protection of laws—Classification of corporations and individuals—Separability of provisions of state statute as to individuals affecting constitutionality as to corporations.*

Where, as in this case, penal provisions as to individuals are separable, and the state court has so construed the statute, any lack of constitutional authority to enact the statute as to individuals would not render the statute unconstitutional as to corporations. *Ib.*

17. *Equal protection of laws; effect of statutory regulations dealing exclusively with persons or property outside of State.*

Statutory regulations dealing exclusively with persons or property not within the borders of the State, if otherwise valid, are not unconstitutional as denying equal protection of the law. (*Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84.) *Ib.*

18. *Equal protection of laws—Power of State to classify corporations and individuals.*

The wider scope of the power of the State over corporations than over individuals affords a basis for separate classification as to the production of books and papers. *Ib.*

19. *Equal protection of laws; deprivation by state statute imposing overwhelming penalties.*

Ex parte Young, 209 U. S. 123, followed as to the unconstitutionality of provisions in a state statute for penalties for violations so enormous as to be overwhelming. *Willcox* v. *Consolidated Gas Co.*, 19.

20. *Equal protection of laws; reasonableness of classification in respect of gas rates.*

Provision in a gas rate act establishing one rate for the municipality

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and another for individual consumers is not an unreasonable classification and does not render the act unconstitutional under the equal protection clause of the Fourteenth Amendment. *Ib.*

21. *Equal protection of laws; right to complain of classification in respect of gas rates.*

Where none of the different classes of consumers complain of different rates the corporation cannot complain of such differences provided the total receipts are sufficient to yield an adequate return. *Ib.*

22. *Full faith and credit clause; judgment against stranger not within.*

The full faith and credit clause of the Constitution does not give any force to a judgment against a stranger; and a decision that a defendant is not estopped by a judgment by reason of notice given to him to defend does not amount, even if wrong, to a refusal to give effect to the judgment within the meaning of the full faith and credit clause of the Constitution. *Bagley* v. *General Fire Extinguisher Co.*, 477.

See JUDGMENTS AND DECREES, 3;
JURISDICTION, A 4.

23. *Property rights; deprivation without just compensation.*

A provision in a state statute, requiring a public service corporation to perform its service in such a manner that its entire plant would have to be rebuilt at a cost on which no return could be obtained at the rate fixed, deprives the company of its ability to secure such return and is unconstitutional and void. *Willcox* v. *Consolidated Gas Co.*, 19.

24. *Searches and seizures—Validity of state statute requiring production by corporation of its books and papers.*

Under the visitorial powers of a State over corporations doing business within its borders it is competent for it to compel such corporations to produce their books and papers for investigation and to require the testimony of their officers and employés to ascertain whether its laws have been complied with, and this power extends to the production of books and papers kept outside of the State, and a statute requiring such production does not amount to an unreasonable search or seizure or a denial of due process of law. (*Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541.) *Hammond Packing Co.* v. *Arkansas*, 322.

25. *Searches and seizures; effect of Fourteenth Amendment to prohibit, unreasonable.*

Quare and not decided whether the due process clause of the Fourteenth

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Amendment embraces in its general terms a prohibition of unreasonable searches or seizures. *Ib.*

Generally. *See* INTERSTATE COMMERCE, 7.

CONSTRUCTION OF STATUTES.

See STATUTES, A.

CONTRACTS.

1. *Construction where meaning not clear.*

Where its meaning is not clear, a contract is to be construed in the light of circumstances surrounding the parties when the contract was made and a practical interpretation given thereto. (*Lowber* v. *Bangs*, 2 Wall. 728.) *Harten* v. *Löffler*, 397.

2. *Admissibility of oral evidence to identify property described as "about."*

"About" is a relative, and frequently ambiguous, term, the precise meaning of which is affected by circumstances; and oral evidence is not inconsistent with, or contradictory of, a written contract which simply identifies property as shown on a diagram annexed thereto, and is admissible to show the intent of the parties in the light of the surrounding circumstances. *Ib.*

3. *Damages; measure of, for breach of contract to sell real estate.*

Where the vendee sues for breach of a contract to sell real estate and the benefit of the business and goodwill as well, the measure of damages is the differences between the purchase price and the market value at the time of the contract and evidence as to the value of each item is admissible. *Ib.*

4. *Admissibility of hypothetical question as to value of property in action for breach of contract to sell.*

A hypothetical question of value of property is not admissible when there is no evidence to support the hypothesis on which it is based. *Ib.*

5. *Duty of courts to deny aid to carry out illegal contracts.*

The court cannot lend its aid in any way to a party seeking to realize the fruits of an illegal contract, and, while this may at times result in relieving a purchaser from paying for what he has had, public policy demands that the court deny its aid to carry out illegal contracts without regard to individual interests, or knowledge of the parties. *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 227.

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6. *Illegal; effect of refusal to enforce.*
The refusal of judicial aid to enforce illegal contracts tends to reduce such transactions. *Ib.*

See ANTI-TRUST ACT; BONDS, 3; CONSTITUTIONAL LAW, 1; CRIMINAL LAW, 2, 6; JURISDICTION, A 10; STATES, 1; VENDOR AND VENDEE, 3.

CONVEYANCES.

See CONSTITUTIONAL LAW, 9; LOCAL LAW (HAW.).

CONVICTS.

See EVIDENCE, 3.

CORPORATIONS.

1. *Locus of Federal corporation for purposes of suit.*
Notwithstanding that it maintains an office in another State, the defendant corporation which was organized under an act of Congress is suable in the district designated by it as where its office is located and in which its agent resides and its directors meet to affirm their acts adopted in the other State. *Matter of Dunn*, 374.

2. *Liability for acts of agent.*
In actions for tort a corporation may be held responsible for damages for the acts of its agent within the scope of his employment, *Lake Shore & Michigan Southern R. R.* v. *Prentice*, 147 U. S. 101, even if done wantonly, recklessly or against the express orders of the principal. *New York Central R. R.* v. *United States*, 481.

3. *Liability for acts of agent.*
A corporation is responsible for acts not within its agent's powers strictly construed but assumed to be done by him when employing authorized powers, and in such a case no written authority under seal is necessary. (*Washington Gas Light Co.* v. *Lansden*, 172 U. S. 534.) *Ib.*

4. *Liability for acts of agent in respect of rates for transportation.*
The act of an agent exercising the authority of a corporation which is a common carrier to make rates for transportation may be controlled, in the interest of public policy, by imputing his act to the carrier itself and imposing penalties therefor upon the carrier. *Ib.*

5. *Criminal capacity.*
While corporations cannot commit some crimes, they can commit

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crimes which consist in purposely doing things prohibited by statute, and in such case they can be charged with knowledge of acts of their agents who act within the authority conferred upon them. *Ib.*

6. *Stockholders' liability; enforcement of.*
A judgment of the highest court of Connecticut, involving the liability of stockholders under provisions in the constitution of Minnesota, reversed on the authority of *Bernheimer* v. *Converse*, 206 U. S. 516. *Converse* v. *Minnesota Thresher Mfg. Co.*, 567.

See CONGRESS, POWERS OF;
CONSTITUTIONAL LAW, 1, 6, 11, 12, 15, 16, 18, 23, 24;
COURTS, 2, 4;
INTERSTATE COMMERCE, 5, 6, 7, 8, 14;
JUDICIAL NOTICE, 1;
LOCAL LAW (KAN.);
MANDAMUS, 2;
REMOVAL OF CAUSES, 4;
RATE REGULATION;
STATES, 7, 8, 9.

COSTS.

See RECEIVERS.

COUPONS.

See BONDS, 3, 4.

COURTS.

1. *Refusal to enforce legislation.*
While courts may refuse to enforce legislation on constitutional grounds the power should only be exercised in the clearest cases. *Knoxville* v. *Knoxville Water Co.*, 1.

2. *Federal interference with enforcement of state regulation fixing rates for public service corporation.*
Federal courts should not declare an ordinance fixing rates for a public service corporation unconstitutional and suspend its operation before it goes into effect unless the rate is clearly confiscatory; and unless complainant furnishes substantial evidence to that effect, the bill should be dismissed without prejudice to a further application to the courts if the rate after going into effect is actually confiscatory. *Ib.*

3. *Duty to take jurisdiction—Right of party to choose tribunal.*
It is not a question of discretion or comity for the Federal court to take jurisdiction of a case; it is the duty of that court to take jurisdiction when properly appealed to; and it should not be criticised for so doing even though the case be one of local interest. *Cohens* v.

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Virginia, 6 Wheat. 264, 404. The right of a party plaintiff to choose the Federal court cannot be properly denied. (*Re Metropolitan Receivership*, 208 U. S. 90, 110.) *Willcox* v. *Consolidated Gas Co.*, 19.

4. *Interference with legislative act fixing rates.*
Rates, when fixed by legislative authority, for public service corporations, should allow a fair return upon the reasonable value of the property at the time it is being used, but the legislative act will not be declared invalid by the courts unless the rates are so unreasonably low that their enforcement would amount to taking the property for public use without compensation. (*San Diego Land and Town Co. Cases*, 174 U. S. 739; 189 U. S. 439.) *Ib.*

5. *Same.*
Except in very clear cases, courts should not interfere with state rate legislation before the legislation goes into effect. (*Knoxville* v. *Knoxville Water Co.*, *ante*, p. 1.) *Ib.*

6. *Same.*
Value of the property employed being an essential element in determining whether a rate is or is not confiscatory, and being also largely a matter of opinion, where the determination of the question depends upon such value, a court of equity should hesitate to interfere by injunction to suspend the rate before it goes into operation and a fair trial has been made. *Ib.*

7. *Powers of this court to interfere with state legislation in fixing, and judicial action in imposing, fines.*
The fixing of punishment for crimes and penalties for unlawful acts is within the police power of the State, and this court cannot interfere with state legislation in fixing fines, or judicial action in imposing them, unless so grossly excessive as to amount to deprivation of property without due process of law. *Waters-Pierce Oil Co.* v. *Texas* (*No.* 1), 86.

8. *Federal and state; duty to respect jurisdiction of each other.*
As the Federal and the state court exercise jurisdiction within the same territory, derived from and controlled by separate authority, each must respect the jurisdiction acquired over property by the other. *Palmer* v. *Texas*, 118.

9. *Exclusiveness of jurisdiction over property.*
When either a Federal, or a state, court of competent jurisdiction takes possession of, or acquires jurisdiction over, property, that property is as effectually withdrawn from the jurisdiction of the other court

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as though removed to the territory of another sovereignty. (*Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54.) *Ib.*

10. *Jurisdiction over property; effect of the giving of a supersedeas pending appeal from order appointing receiver.*
Jurisdiction over property, properly acquired by the state court on the qualification of the receiver, is not lost by the giving of a *supersedeas* pending appeal which, as in this case, merely suspends the order of appointment. *Ib.*

11. *Jurisdiction over property; right to limit interference by other courts.*
When a state court has acquired jurisdiction over property before any application is made to the Federal court it has the right while lawfully exercising that jurisdiction to determine how far it will permit any other court to interfere therewith. (*People's Bank* v. *Calhoun*, 102 U. S. 256.) *Ib.*

12. *Jurisdiction over property; accrual on appointment and qualification of receiver.*
Jurisdiction over property by a state court so as to withdraw it from the jurisdiction of Federal courts in the same territory, does not necessarily depend on possession, but is acquired as soon as the receiver has been appointed and has qualified. *Farmers' Loan & Trust Co.* v. *Lake St. Electric Railway Co.*, 177 U. S. 59, followed; *Shields* v. *Coleman*, 157 U. S. 168, distinguished. *Ib.*

13. *Federal courts bound by state court's construction of state statutes.*
The courts of a State construe its statutes and their judgment is conclusive in the Federal courts. *Ib.*

14. *Discretionary power to determine rights.*
The law must save the rights of parties and not leave them to the discretion of the courts as such. *Louisville &c. R. R. Co.* v. *Stockyards Co.*, 132.

15. *Power to cure defect in provision of state constitution.*
Where a general provision in the constitution of a State is void as taking property without due process or compensation, and compensation has not been provided by statute, the defect cannot be cured by the courts inserting provisions for compensation in judgments under such constitutional provision. *Ib.*

16. *Wisdom of legislation no concern of.*
Where the subject is within the power of the State it is not within the province of the judiciary to disregard statutory standards on the

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ground that the legislature did not act wisely in enacting them. *Waters-Pierce Oil Co.* v. *Deselms*, 159.

17. *Power of this court to relieve from effects of mistake of law.*
Relief cannot be afforded by this court to one who violates the provisions of a state statute from an erroneous conception of what the statute requires. *Hammond Packing Co.* v. *Arkansas*, 322.

18. *Federal; practice in respect of doctrines of commercial law and general jurisprudence.*
In respect to the doctrines of commercial law and general jurisprudence, while courts of the United States, in questions balanced with doubt, will, for the sake of harmony, lean towards an agreement with the state courts, as a general rule they will exercise their independent judgment uncontrolled by decisions based on local statutes and usage; and so in this instance as the state court proceeded in part on grounds inconsistent with the decisions of this court in such cases, its decision should not be followed. *Ball, Hutchings & Co.* v. *Presidio County*, 88 Texas, 60, not followed. *Presidio County* v. *Noel-Young Bond Co.*, 58.

See CLERKS OF COURT;
CONSTITUTIONAL LAW, 6;
CONTRACTS, 5;
COURTS-MARTIAL, 3;
EVIDENCE, 3;
INTERSTATE COMMERCE, 6;
JUDICIAL AND LEGISLATIVE FUNCTIONS;
JURISDICTION;
MANDAMUS, 1.

COURTS-MARTIAL.

1. *Waiver of rights by officer of Navy—Use as evidence of proceedings of court of inquiry.*
A commissioned officer in the Navy can waive the provisions of art. 60 of § 1624, Rev. Stat., and allow proceedings of a court of inquiry to be evidence on a court-martial the sentence of which may extend to his dismissal; *Schick* v. *United States*, 195 U. S. 65; and, where, at the request of such an officer, the Secretary of the Navy convenes a court-martial to try him on matter which had already been the subject of a court of inquiry, on condition that the proceedings of such court of inquiry be evidence, each party having the privilege, however, of introducing other evidence, the accused is not deprived of any substantial right so that the sentence of the court-martial is invalidated. *Mullan* v. *United States*, 516.

2. *Sentence; reduction by President constituting mitigation within meaning of § 1624, Rev. Stat.*
Reduction by the President of the United States of the dismissal of an officer of the Navy from the service to reduction to one-half sea pay

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for five years is a mitigation of the sentence within the meaning of art. 54 of § 1624, Rev. Stat. *Quære*, whether art. 54 of § 1624 applies to the action of the President. *Ib.*

3. *Review of sentence by civil courts.*
Civil courts are not courts of error to review sentences of legally organized courts-martial having jurisdiction of the person of the accused and of the offense. *Ib.*

COURT OF CLAIMS.

Appeal from judgment of Court of Claims fixing amounts to be paid from an Indian fund dismissed for want of jurisdiction. United States *v.* Hemphill and Murchison, 552.
See WAR, 2.

COURT OF INQUIRY.
See COURTS-MARTIAL, 1.

CRIMINAL APPEALS.
See JURISDICTION, A 17.

CRIMINAL LAW.

1. *Practice in respect of errors in trial.*
In criminal cases courts are not as exacting in regard to the character of objections as in civil cases, and will notice error in the trial of a criminal case although the question may not have been raised in exactly the proper manner at the trial. (*Wiborg* v. *United States*, 163 U. S. 632.) *Crawford* v. *United States*, 183.

2. *Conspiracy under § 5440, Rev. Stat.; sufficiency of indictment for.*
An indictment which sets forth the details of a corrupt contract between defendant and a government official by which, from its nature, the Government would be defrauded, is sufficient to sustain a charge of conspiracy under § 5440, Rev. Stat., even if it does not allege in what particular manner the conspirators intended to defraud the United States. *Ib.*

3. *Conspiracy to defraud Government within meaning of § 5440, Rev. Stat.*
An agreement by an official of the United States under which he secretly receives any portion of what is paid for supplies furnished on his requisition is one to defraud the United States within § 5440, Rev. Stat. *Ib.*

4. *Sufficiency of indictment for conspiracy under §§ 5508, 5509, Rev. Stat.*
Judgment of the Circuit Court sustaining demurrer to indictment for

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conspiracy in alleged violation of §§ 5508, 5509, Rev. Stat., affirmed, without opinion, on the authority of *Hodges* v. *United States*, 203 U. S. 1. *United States* v. *Powell*, 564.

5. *Indictment; rule as to sufficiency.*
An indictment is sufficient if it specifically states the elements of the offense charged with sufficient particularity to fully advise the defendant thereof and so as to be pleaded in bar of any subsequent prosecution for the same offense. Sec. 1025, Rev. Stat. *New York Central R. R.* v. *United States*, 481.

6. *Liability under statute of one becoming party to and carrying out illegal agreement executed prior to its passage.*
Even though it would be giving a penal statute a retroactive effect to make it apply to an unlawful agreement executed prior to the passage of the act by defendant's predecessor in interest, defendant is subject to conviction for violating the act after its enactment by making itself a party to and carrying out its illegal provisions. *Waters-Pierce Oil Co.* v. *Texas* (*No.* 1), 86.

See CONGRESS, POWERS OF; COURTS, 7; CORPORATIONS, 5; EVIDENCE; INTERSTATE COMMERCE, 8, 9, 10, 12; JURY AND JURORS; PRACTICE AND PROCEDURE, 12; STATES.

CRIMINAL STATUTES.

See STATUTES, A 2.

CUBA.

See WAR, 1, 2, 3.

CUSTOM.

See JUDICIAL NOTICE, 2.

DAMAGES.

See ACTIONS, 1; CARRIERS, 3, 4; CONTRACTS, 3; CORPORATIONS, 2; NEW TRIAL; MARITIME LAW, 1, 2, 4; VERDICT, 2.

DEBTS DUE UNITED STATES.

Claim on bond of depositary for receiver in bankruptcy as debt due United States entitling surety to preference.
Judgment of the state court to effect that surety on bond of the deposi-

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tary of a receiver in bankruptcy which ran, as required by law, to the United States, was not entitled to priority in distribution of assets of the depositary, affirmed without opinion. *American Surety Co.* v. *Akron Savings Bank*, 557.

DEEDS.

1. *Description of property—Land embraced by words "sea beach" in Hawaiian deed.*

While the words "sea beach" taken in a strict sense might not include a small strip outside of the metes and bounds specified in an Hawaiian deed, where by natural interpretation the grant conveyed all the upland to low water mark, and with it all accretions, this court will not reverse a ruling of the lower court to that effect. *Spreckels* v. *Brown*, 208.

2. *Description of property; effect of monuments in diagram.*

In a deed to property in Hawaii monuments shown in a diagram held to prevail, in case of discrepancy, over metes and bounds. *Ib.*

DEFENSES.

See VENDOR AND VENDEE.

DEPORTATION OF CHINESE.

See IMMIGRATION.

DISTRICT OF COLUMBIA.

See JURY AND JURORS, 1.

DIVERSITY OF CITIZENSHIP.

See REMOVAL OF CAUSES, 1

DOWER.

See MINES AND MINING, 3.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 2–14, 24, 25; COURTS, 7; IMMIGRATION; RATE REGULATION, 6; STATES, 1.

ELKINS ACT.

See INTERSTATE COMMERCE.

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EMPLOYER AND EMPLOYÉ.
See JURY AND JURORS, 3, 4, 5;
MASTER AND SERVANT.

ENEMY COUNTRY.
See WAR, 1.

ENEMY PROPERTY.
See WAR, 3.

EQUAL PROTECTION OF LAWS.
See CONSTITUTIONAL LAW, 15–21

EQUITY.
See APPEAL AND ERROR, 1;
COURTS, 6;
PRACTICE AND PROCEDURE, 5.

ESTOPPEL.
See BONDS, 1.

EVIDENCE.

1. *Admissibility to show moral character of defendant in criminal case.*
Where a letter written to defendant is admitted in evidence for the purpose of showing the moral character of defendant and that he had endeavored to destroy evidence in the writer's hands so as to prevent its being used against him on the trial, the answer immediately written should also be admitted, whether written by defendant or his counsel under his direction; and defendant's own evidence in regard to the matter alleged is admissible so as to disclose the whole transaction. *Crawford* v. *United States*, 183.

2. *Presumption of harm in errors as to admission or exclusion.*
There is a presumption of harm caused by errors in regard to the admission or exclusion of evidence in a jury trial which requires the reversal of the judgment unless the record clearly shows the absence of harm. *Ib.*

3. *Convicts; caution and suspicion with which testimony of, to be received.*
The extent to which the law officers of the Government will use evidence of persons already convicted of the crime of conspiracy for which defendant is also indicted, is within their discretion, and their action will not be reviewed by the courts; but the evidence

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of such witnesses is to be received with caution and suspicion, and is not entitled to the same credence as that given to ordinary witnesses. *Ib.*

4. *Exclusion constituting reversible error.*
In considering whether error in excluding defendant's evidence in a criminal trial is reversible it is not enough that inferences favorable to defendant might have been drawn from some of the admitted testimony; he is entitled to state directly on oath facts that are relevant. *Ib.*

5. *Admissibility of books of accounts.*
While a book of accounts may be inadmissible as evidence so far as it relates to accounts between the parties it may be admissible as written corroborative evidence, and as part of a transaction, to be submitted to the jury for what it is worth. *Ib.*

See ATTORNEY AND CLIENT; BURDEN OF PROOF; CARRIERS, 3, 4; CONSTITUTIONAL LAW, 12; CONTRACTS, 2, 3, 4; COURTS-MARTIAL, 1; INSTRUCTIONS TO JURY; JURISDICTION, A 2, 14; RATE REGULATION, 15, 16.

EXCESSIVE PENALTIES.

See CONSTITUTIONAL LAW, 4, 19.

EXECUTIVE POWERS.

When judicial yields to executive process.
Public danger warrants the substitution of executive for judicial process; and the ordinary rights of individuals must yield to what the executive honestly deems the necessities of a critical moment. *Moyer* v. *Peabody*, 78.

See COURTS-MARTIAL, 2.

EXPRESS COMPANIES.

See INTERSTATE COMMERCE, 2, 3, 4.

FACTS.

See PRACTICE AND PROCEDURE, 4, 5; PUBLIC LANDS, 1.

FEDERAL QUESTION.

See JUDGMENTS AND DECREES, 3; JURISDICTION; NAVIGABLE WATERS, 1; PRACTICE AND PROCEDURE, 2.

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FEDERAL AND STATE COURTS.
See COURTS, 8, 9, 11, 12, 13, 18.

FEES.
See CLERK OF COURT.

FELLOW SERVANTS.
See MASTER AND SERVANT, 2, 3.

FICTION.
See PROPERTY RIGHTS, 1.

FINAL JUDGMENTS.
See JUDGMENTS AND DECREES, 2, 3;
JURISDICTION, A 25;
STATES, 4.

FINDINGS OF FACT.
See PRACTICE AND PROCEDURE, 4, 5.

FINES AND PENALTIES.
See CONSTITUTIONAL LAW, 5;
COURTS, 7.

FISHERIES.
See STATES, 5, 6.

FOREIGN CORPORATIONS.
See CONSTITUTIONAL LAW, 1;
STATES, 7, 8.

FOURTEENTH AMENDMENT.
See CONSTITUTIONAL LAW.

FRANCHISES.
See LOCAL LAW (KAN.);
RATE REGULATION, 7, 11;
STATES, 9.

FRANKS.
See INTERSTATE COMMERCE, 2, 3, 4.

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FRAUD.

See PRACTICE AND PROCEDURE, 10;
PUBLIC LANDS, 2.

FULL FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 22;
JUDGMENTS AND DECREES, 3;
JURISDICTION, A 4.

GENERAL ORDERS IN BANKRUPTCY.

See JURISDICTION, A 19.

GRANTS.

See LOCAL LAW (KAN.);
STATES, 3.

HABEAS CORPUS.

1. *Appeals from judgments of Circuit Court, denying petitions for writ of habeas corpus made by persons held under process of state court, denied, there being no certificate of probable cause as provided by act of March* 10, 1908, *c.* 76, 35 *Stat.* 40. Bilik *v.* Strassheim, 551; Ex parte Patrick, 555.

2. *Persons sentenced by Supreme Court of Canal Zone denied leave to file petition for.* Matter of Coulson, 553.

3. *One confined under Michigan indeterminate sentence act denied leave to file petition for.* Matter of Hardrat, 554.

See JUDGMENTS AND DECREES, 5;
JURISDICTION, A 16.

HAWAII.

See DEEDS, 1, 2;
JURISDICTION, A 25, 29;
LOCAL LAW (HAW.).

HEPBURN ACT.

See INTERSTATE COMMERCE, 2, 3.

HYPOTHETICAL QUESTIONS.

See CONTRACTS, 4.

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IMMIGRATION.

Deportation of Chinese—Due process of law.

A judgment of the District Court of the United States, affirming an order of deportation of a Chinese person, affirmed without opinion. Plaintiff in error claimed to be entitled to trial by jury and that he had been denied due process of law. *Goon Shung* v. *United States*, 566.

IMPAIRMENT OF CONTRACT OBLIGATION.

See CONSTITUTIONAL LAW, 1.

IMPEACHMENT OF JUDGMENT.

See JUDGMENTS AND DECREES, 1, 4, 5.

INCORPORATION.

See JUDICIAL NOTICE, 1.

INDIANS.

See COURT OF CLAIMS.

INDIAN TERRITORY.

See APPEAL AND ERROR, 2, 3.

INDICTMENT.

See CRIMINAL LAW, 2, 4, 5;
INTERSTATE COMMERCE, 8;
PRACTICE AND PROCEDURE, 12.

INFANTS.

See VERDICT, 2.

INJUNCTION.

See COURTS, 6;
INTERSTATE COMMERCE, 2.

INSTRUCTIONS TO JURY.

1. *Propriety of permitting jury to consider non-appearance of witness and non-production of books.*

An instruction which simply amounts to permitting the jury to consider circumstances connected with the non-appearance of a witness and the non-production of books *held*, in this case, not to have been prejudicial error. *New York Central R. R.* v. *United States*, 481.

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2. *Duty of counsel in respect of ambiguity in.*
If an ambiguity exists in the charge counsel should at the time ask the court to remove it. *Waters-Pierce Oil Co.* v. *Deselms*, 159.
See VERDICT, 1, 2.

INTERIOR DEPARTMENT.
See PUBLIC LANDS, 1.

INTERSTATE COMMERCE.

1. *Power of Congress over—Intention in Elkins act.*
The power of Congress over interstate transportation embraces all manner of carriage whether gratuitous or otherwise; and, in the absence of express exceptions, the intention of Congress in enacting the Elkins act was to prevent any departure whatever from published rates. *American Express Co.* v. *United States*, 522.

2. *Hepburn act—Obligation of express companies to file and publish rates.*
Whether or not the issuing of express franks to officers and employés of express companies and their families is prohibited by § 2 of the Interstate Commerce Act of February 4, 1889, c. 104, 24 Stat. 379, an injunction is authorized under § 3 of the Elkins act of February 19, 1903, c. 708, 32 Stat. 846, wherever a common carrier is engaged in the carriage of passengers or freight at less than the published rate, and by the Hepburn act of June 29, 1906, c. 3591, 34 Stat. 584, express companies are brought within the act, and obliged to file and publish their rates. *Ib.*

3. *Hepburn act—Exceptions in § 1 not applicable to transportation of merchandise by express companies.*
The exceptions contained in the provision in § 1 of the Hepburn act of June 29, 1906, c. 3591, 34 Stat. 584, allowing a common carrier to issue passes for free transportation of passengers to certain classes of persons cannot be extended to give express companies the right to issue passes to the same classes of persons for transportation of merchandise. *Ib.*

4. *Elkins act; issuance of express franks within prohibition of.*
The purpose of the Elkins act is to require publication of tariff and to prevent and prohibit all discrimination, and the issuing of express franks falls within such prohibition. *Ib.*

5. *Constitutionality of Elkins act.*
Congress has power to so regulate interstate commerce as to secure equal rights to all engaged therein, and the act of February 19,

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1903, c. 708, 32 Stat. 847, known as the Elkins act, is not unconstitutional because it imputes to the corporation, and makes it criminally responsible for, acts violative of the Interstate Commerce Act done by its agent. *New York Central R. R.* v. *United States*, 481, 500.

6. *Instrumentalities of—Judicial notice of predominance of corporations.*
The court will recognize that the greater part of interstate commerce is conducted by corporations, and it will not relieve them from punishment because at one time there was a doctrine that corporations could not commit crimes. *New York Central R. R.* v. *United States*, 481.

7. *Elkins act; validity as to corporations.*
Even if a statute relating both to individuals and corporations deprived an individual of the presumption of innocence and made him responsible for the acts of another, the question of the constitutionality of such statute on that ground cannot be raised by a corporation; and where, as in the case of the Elkins act, there is no doubt that Congress would have enacted the statute as to corporations, even if it could not as to individuals, it is valid as to corporations. (*Berea College* v. *Kentucky*, 211 U. S. 45.) *Ib.*

8. *Elkins act; effect of inclusion of agent and corporation in one indictment.*
The purpose of the Elkins act being to make the act of the agent the act of the corporation, and to include both within its restrictions, there is no misjoinder in including both the agent and the corporation in one indictment. *Ib.*

9. *Rebates; payments constituting separate offenses.*
Under the Interstate Commerce Act where a shipper pays the legal rate on numerous shipments and at intervals receives a rebate from the carrier there is a separate and complete offense on each payment and not one continuous offense, although all the payments were made under one agreement. *New York Central R. R.* v. *United States*, 481, 500.

10. *Same.*
Quære, and not decided, what constitute separate offenses where numerous shipments are made and paid for at less than the published rate. *New York Central R. R.* v. *United States*, 481.

11. *Elkins act; application to rebates.*
The Elkins act applies to rebates paid after it went into effect although paid in pursuance of an agreement, and on shipments, made prior

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to that date, the agreement being illegal when made. *New York Central R. R.* v. *United States*, 500.

12. *Elkins act; rebating; party to joint rate liable.*
Under the Elkins Law of February 19, 1903, c. 708, 32 Stat. 847, a carrier can be prosecuted for the offense of rebating where it is a party to a joint rate although it has not filed or published the same. *United States* v. *New York Central R. R. Co.*, 509.

13. *Elkins act—Rebates, what amounts to giving.*
This court by a divided court and without opinion affirms the judgment of the lower court holding a common carrier guilty of violating § 1 of the Elkins act of February 19, 1903, c. 708, 32 Stat. 847. The contention of the carrier was that the amount paid to the shipper was for use of tracks owned by the shipper, although there was no reference thereto in the published rate. *Chicago & Alton Ry. Co.* v. *United States*, 563.

14. *State interference with; appointment of receiver as.*
Where the state courts have sustained a receivership of a foreign corporation on a statute in force before the corporation entered the State, and such statute provides for the appointment of a receiver in case of dissolution, forfeiture, insolvency or imminent danger thereof, the fact that the receivership was also sustained under provisions of an anti-trust law passed after the corporation entered the State, does not amount to an unlawful interference of the rights of such corporation to transact interstate commerce business. *Palmer* v. *Texas*, 118.

See ANTI-TRUST ACT.

JOINDER OF PARTIES.

See REMOVAL OF CAUSES, 1, 2.

JUDGMENTS AND DECREES.

1. *Conclusiveness of judgment—Mistake of law as ground for impeachment.*
A judgment is conclusive as to all *media concludendi* and cannot be impeached in or out of the State by showing it was based on mistake of law. (*Fauntleroy* v. *Lum*, 210 U. S. 230.) *American Express Co.* v. *Mullins*, 311.

2. *Finality of judgment of Circuit Court of Appeals where constitutional question involved.*
While the judgment of the Circuit Court of Appeals is not final under act of March 3, 1891, c. 517, 26 Stat. 826, 828, where diverse citizen-

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ship exists, if the application of the Constitution of the United States is also invoked in the complaint, *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, the judgment is final if the constitutional right is raised for the first time on the trial. *Bagley* v. *General Fire Extinguisher Co.*, 477.

3. *Finality of judgment of Circuit Court of Appeals—What amounts to assertion of constitutional right under full faith and credit clause.*

In a suit where the jurisdiction of the Circuit Court is based on diversity of citizenship a recital in the petition that a judgment was rendered in another State does not amount to asserting the constitutional right that full faith and credit be given thereto so as to deprive the judgment of the Circuit Court of Appeals of its finality. *Ib.*

4. *Judgment of Circuit Court based on evidence affecting its jurisdiction open to review but not to collateral attack.*

After the Circuit Court of the United States has heard and passed on evidence affecting its jurisdiction, its judgment is open to review in the appellate court by writ of error, but the judgment cannot be attacked collaterally as absolutely void. *Toy Toy* v. *Hopkins*, 542.

5. *Effect of judgment of Circuit Court in criminal case over which it erroneously retained jurisdiction.*

Even though the Circuit Court erroneously retains jurisdiction of a criminal case against an allottee Indian, its judgment is not void but should be corrected on appeal or by writ of error and cannot be attacked in *habeas corpus* proceedings. *Ib.*

See APPEAL AND ERROR, 3; BONDS, 4; CONSTITUTIONAL LAW, 22; COURTS, 13, 15; JURISDICTION, A 25; LOCAL LAW (ARIZ.); STATES, 4.

JUDICIAL AND EXECUTIVE POWERS.

See EXECUTIVE POWERS.

JU ICIAL AND LEGISLATIVE FUNCTIONS.

When remedy for defective law rests with Congress and not with the courts.

Where Congress has used plain and explicit language the only province of the courts is to give effect to the act as plainly expressed in its terms, and if the law is defective in not extending to one class of common carriers privileges extended to another, the remedy is in the hands of Congress and not of the courts. *American Express Co.* v. *United States*, 522.

See COURTS, 15, 16.

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JUDICIAL NOTICE.

1. *Of Federal origin of corporation.*

This court will judicially notice that a defendant corporation was incorporated by an act of Congress even though the petition fails so to do. *Matter of Dunn*, 374.

2. *Of custom as to use of oil.*

Under the circumstances of this case, this court will not hold that the Supreme Court of Oklahoma erred in judicially noticing a custom in the Territory to use coal oil in kindling fires. *Waters-Pierce Oil Co.* v. *Deselms*, 159.

See INTERSTATE COMMERCE, 6.

JUDICIAL PROCESS.

See APPEAL AND ERROR;
CARRIERS, 1, 2.

JURISDICTION.

A. OF THIS COURT.

1. *Amount in controversy—Review of judgment of Court of Appeals, D. C.*

In an action by the vendee for damages, although the amount recovered is less than $5,000, if the vendor not only disputes the judgment but claims more than $5,000 as balance of purchase money this court has jurisdiction to review the judgment of the Court of Appeals of the District of Columbia. *Harten* v. *Löffler*, 397.

2. *Amount in controversy—Conclusiveness of tax returns to fix value of property.*

Tax returns are not conclusive as to values. Where it sufficiently appears by affidavits in the record and in this court that the value of the land involved exceeds the jurisdictional amount, the case will not be dismissed on a motion based on lower valuations in tax returns. *Spreckels* v. *Brown*, 208.

3. *Under § 709, Rev. Stat.—Existence of Federal question. Question whether State has assented to obstructions in navigable waters, non-Federal.*

Section 10 of the River and Harbor Act of March 3, 1899, c. 425, 30 Stat. 1151, alters § 7 of the River and Harbor Act of September 19, 1890, c. 907, 26 Stat. 454, and prohibits obstructions in navigable waters of the United States not affirmatively authorized by Congress, and whether the State has assented to such obstructions remains with the State alone and is not a Federal question

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reviewable by this court under § 709, Rev. Stat. *North Shore Boom Co.* v. *Nicomen Boom Co.*, 406.

4. *Under § 709, Rev. Stat.—When constitutional question raised and denied.*

Where in the state court defendant distinctly claimed that a recovery would be prevented if full faith and credit were given to a judgment of the courts of another State, and this claim is expressly denied, this court has jurisdiction to review under § 709, Rev. Stat. *American Express Co.* v. *Mullins*, 311.

5. *Under § 709, Rev. Stat.—When question of exclusion of negroes from jury not reviewable.*

Where neither the constitutionality of the state statute, nor the interpretation thereof by the state court, is assailed, but the contention is that negroes were excluded from the jury because of their race or color, the question, in the absence of such gross abuse as to amount to denial of due process of law, is one of fact, and the decision of the state court is not reviewable by this court under § 709, Rev. Stat. *Thomas* v. *Texas*, 278.

6. *Under § 709, Rev. Stat.—Want of jurisdiction where judgment of state court rests on sufficient non-Federal ground.*

Although the state court may incorrectly charge as to certain provisions of a statute if the jury finds that defendant has violated those provisions and also other provisions not involving any Federal question, and only one penalty is assessed, the judgment rests on a non-Federal ground sufficient to sustain it, and this court has not jurisdiction to review it under § 709, Rev. Stat. *Waters-Pierce Oil Co.* v. *Texas* (*No.* 1), 86.

7. *Under § 709, Rev. Stat.; limitation of.*

The jurisdiction of this court, under § 709, Rev. Stat., to review the proceedings of state courts is limited to specific instances of denials of Federal rights specially set up in and denied by the state court. *Ib.*

8. *Writ of error to review judgment of state court dismissed for want of jurisdiction under § 709, Rev. Stat., without opinion.* Thornton *v.* Natchez, 559.

9. *Of direct appeal from Circuit Court.*

American Sugar Refining Co. v. *United States*, 211 U. S. 155, followed, and a direct appeal from the Circuit Court in a case where the only real substantial point was whether an officer of the United States had misconstrued the tariff act of 1897, dismissed. *Shaw* v. *United States*, 559.

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10. *Review of judgment of state court—Denial of constitutional right—Exercise of reserved power to repeal, alter or amend charter.*

The claim of an irrepealable contract cannot be predicated upon a contract which is repealable; and, where the reserved power to repeal, alter and amend charters is only to be exercised without injustice, it is within the province of the state court to determine whether it has been so exercised, and its decision cannot be reviewed by this court unless a contract has been impaired or some other and fundamental right within the protection of the Federal Constitution has been denied. *Hammond Packing Co.* v. *Arkansas*, 322.

11. *Where judgment of state court based on sufficient non-Federal grounds.*

When a state court decides a case upon a non-Federal ground which is sufficient to maintain the decision this court will not review the judgment. *Waters-Pierce Oil Co.* v. *Texas (No. 2)*, 112.

12. *Federal question raised too late for purposes of.*

Writ of error to review a judgment of the state court dismissed, the Federal question having been raised for the first time on petition for rehearing in the Supreme Court of the State, and that court having declined to pass on it as having come too late. *Electric Light & Power Co.* v. *Clay Center*, 564.

13. *Lack of Federal question.*

Writs of error to review judgment of the Supreme Court of the State of Washington, 40 Washington, 414; *S. C.*, 91 Pac. Rep. 1, involving the right of a patentee of the United States to construct a dam across an arm of a lake in the State of Washington, dismissed for want of jurisdiction; plaintiff in error claiming such right under the Desert Land Act of March 3, 1877, c. 107, 19 Stat. 377, and defendant in error claiming that there was no Federal question, or if any existed, it was raised too late. *Spokane Val. Land & Water Co.* v *Madson*, 565.

14. *Lack of Federal question.*

Writ of error to review a judgment of conviction for liquor selling without having first paid the special Federal tax therefor, dismissed for want of jurisdiction. Plaintiff in error contended that the indictment was found on evidence improperly obtained. *Freshman* v. *United States*, 566.

15. *Where judgment based on sufficient non-Federal ground.*

Writ of error to review 99 Texas, 491, dismissed for want of jurisdiction, there being a non-Federal ground on which the judgment rested sufficient to sustain it without regard to the Federal question, if any, involved. *St. Louis Southwestern Ry. Co.* v. *Tyler*, 552.

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16. *Of appeal from judgment denying habeas corpus—Lack of certificate of probable cause fatal.*

Appeal from judgment of Circuit Court, denying petition for writ of *habeas corpus* where petitioner was held under process of the state court, dismissed for want of jurisdiction. There was no certificate of probable cause for allowing the appeal in conformity with the act of March 10, 1908, c. 76, 35 Stat. 40. *Bilik* v. *Strassheim*, 551; *Ex parte Patrick*, 555.

17. *Review of judgments of conviction in criminal cases, under act of March* 3, 1891.

Jurisdiction of this court to review judgments of conviction in criminal cases under clause 3 of § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827, as amended by the act of July 20, 1897, c. 68, 29 Stat. 492, depends on the sentence which can be imposed, and not on the crime charged in the indictment; and where the Federal statute prescribes that the punishment shall be the same as that prescribed by the state law and under the state law the punishment is less than capital a writ of error will not lie. *Rakes* v. *United States*, 55.

18. *Same—Sufficiency of raising of issue involving construction or application of Constitution.*

The suggestion in the brief of counsel of the unconstitutionality of the statute under which plaintiff in error was convicted, does not raise an issue involving the construction or application of the Constitution giving this court jurisdiction to review under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827, when the contention presented has been heretofore adversely disposed of; nor does the assertion of errors of construction furnish a basis for jurisdiction under that statute. *Ib.*

19. *Time within which writ of error to review adjudication of bankruptcy of District Court may be brought.*

The time within which a writ of error may be brought to review an adjudication of bankruptcy of the District Court is two years as regulated by §§ 4, 5, of the act of March 3, 1891, c. 517, 26 Stat. 826, 827, and not thirty days, the time fixed for appeals by general order of this court in bankruptcy, No. 36. (*Allen* v. *Southern Pacific Co.*, 173 U. S. 479.) *F. L. Grant Shoe Co.* v. *Laird*, 445.

20. *To review adjudication of District Court in bankruptcy; effect of revisory proceeding in Circuit Court of Appeals.*

The objections to a double resort to review decisions of the lower courts to both the Circuit Court of Appeals and this court do not apply where the proceeding in the Circuit Court of Appeals is merely revisory as it is under § 24*b* of the Bankruptcy Act; and a merely

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interlocutory decision in such a proceeding cannot prevent a case otherwise proper to be brought here, from being taken to this court after final judgment. *Ib.*

21. *Appeal from the Circuit Court of Appeals affirming orders and decrees of the bankruptcy court dismissed for want of jurisdiction on authority of* Chapman *v.* Bowen, 207 U. S. 89. Clevenger *v.* Chaney, 562.

22. *To review decisions of Court of Appeals, D. C., in trade-mark cases appealed from Commissioner of Patents.*

Proceedings under the Trade-Mark Act of February 20, 1905, c. 592, 33 Stat. 724, and the specific provisions of § 9 thereof, are governed by the same rules of practice and procedure as in the instance of patents; and decisions of the Court of Appeals of the District of Columbia on appeals from the Commissioner of Patents are not reviewable by the court. *Frasch* v. *Moore*, 211 U. S. 1, followed; *Gaines* v. *Knecht & Son*, 27 App. D. C. 530, approved. *Atkins* v. *Moore*, 285.

23. *Of appeals in patent cases.*

Frasch v. *Moore*, 211 U. S. 1, followed to effect that decisions of the Court of Appeals of the District of Columbia in appeals from the Commissioner of Patents are not reviewable by this court. *Johnson* v. *Mueser*, 283.

24. *Writ of error to review decision of Court of Appeals of the District of Columbia on appeal from Commissioner of Patents dismissed on authority of* Frasch *v.* Moore, 211 U. S. 1. Gaines *v.* Knecht, 561.

25. *To review judgment of Supreme Court of Hawaii.*

Although the Supreme Court of Hawaii has no authority to enter a final judgment which is reviewable by this court when the case is before it on bill of exceptions it may do so when a writ of error has brought up the judgment. *Cotton* v. *Hawaii*, 211 U. S. 162, distinguished. *Spreckels* v. *Brown*, 208.

26. *Writ of error to review judgment of District Court for Porto Rico—Jurisdictional amount.*

Writs of error to the District Court of the United States for Porto Rico, dismissed for want of jurisdiction because the judgments sought to be reversed were each less than $5,000. Plaintiffs below were citizens of the United States and Porto Rico, and the defendant a citizen of Spain who filed pleas to the jurisdiction and claimed that by the overruling of such pleas he had been denied rights under the treaty of Paris and laws of the United States. *Valdes* v. *Munich*, 568.

27. *Writ of error to review judgment of the Supreme Court of the Canal*

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Zone dismissed for want of jurisdiction. Coulson *v.* Government of the Canal Zone, 553.

28. *Writ of error to review judgment of Supreme Court of Philippine Islands dismissed for want of jurisdiction.* Enriquez *v.* Watson & Co., 557.

29. *Writ of error dismissed for want of jurisdiction, it appearing that the merits of the case had been finally determined by the Supreme Court of Hawaii before the passage of the act of March* 3, 1905, *c.* 1465, 33 *Stat.* 1035, *extending the jurisdiction here to review of cases from that court involving over five thousand dollars.* Notley *v.* Brown, 570.

30. *Appeal dismissed for want of jurisdiction on authority of* Kansas City Northwestern Railroad Co. *v.* Zimmerman, 210 U. S. 336. Abrams *v.* White, 558.

31. *Appeal from judgment of Court of Claims fixing amounts to be paid from an Indian fund dismissed for want of jurisdiction.* United States *v.* Hemphill and Murchison, 552.

32. *Writs of error to review judgments of Supreme Court of State of Indiana,* 168 Indiana, 438, 467, *and* 80 N. E. Rep. 845, *in suits involving the constitutionality of the Employers' Liability Act of that State dismissed for want of jurisdiction without opinion.* Tullis *v.* Lake Erie & Western R. R. Co., 175 U. S. 348, *followed.* Pittsburg &c. Ry. Co. *v.* Lightheiser, 560.

See APPEAL AND ERROR, 2;
NEW TRIAL.

B. OF CIRCUIT COURT OF APPEALS.

See APPEAL AND ERROR, 2;
JURISDICTION, A 20.

C. OF CIRCUIT COURT.

1. *Amount in controversy; when aggregate amount of claims the test of jurisdiction.*

Where a number of claims are so tied together by combination or conspiracy as to make the relief sought in regard thereto one claim, the aggregate amount of such claims will be the test of jurisdiction of the Circuit Court; but if the plaintiff fails to prove such combination or conspiracy each claim must be regarded as separate, and, as to those which are less than $2,000, the Circuit Court has not jurisdiction. *McDaniel* v. *Traylor*, 428.

2. *What constitutes deprivation of constitutional right for which suit maintainable under* §§ 629, 1979, *Rev. Stat.*

Without deciding other questions as to the jurisdiction of the Circuit

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Court, *held* that the declaration of plaintiff in error in this case against the former governor of Colorado for arrest and detention during a period of insurrection does not give the Circuit Court jurisdiction thereof under § 629 or § 1979, Rev. Stat., as a suit authorized by law brought to redress the deprivation of a constitutional right. *Moyer* v. *Peabody*, 78.

3. *Mandamus to compel retention.*
Leave to file petition for mandamus to compel Circuit Court to retain jurisdiction of a condemnation proceeding as to parties whose interest was less than the jurisdictional amount refused. *Matter of Chesapeake & Ohio Ry. Co.*, 554.

See RATE REGULATION, 15.

D. ADMIRALTY.

See ADMIRALTY.

E. OF STATE COURTS.

See COURTS, 10, 11, 12.

F. OF SECRETARY OF INTERIOR.

See PUBLIC LANDS, 1.

G. GENERALLY.

See COURTS, 3, 8, 9;
NAVIGABLE WATERS, 2;
STATES, 1, 3, 4.

JURISDICTIONAL AMOUNT.

See JURISDICTION, A 1, 2, 26; C 1, 3;
MANDAMUS, 1.

JURY AND JURORS.

1. *Qualifications of jurors in District of Columbia.*
In the District of Columbia jurors must, at least, have the qualifications stated in § 215, and are exempt under § 217 of the Code, but these sections are not inconsistent with, or exclusive of, the common-law rule that one in relation with either party is incompetent. *Crawford* v. *United States*, 183.

2. *Qualifications of juror at common law.*
Under the common law one is not a competent juror who is master, servant, steward, counsellor or attorney of either party, and

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statutory provisions of qualifications, not inconsistent with this rule, do not strike it down. *Ib.*

3. *Qualifications of jurors in criminal case; relation with Government disqualifying.*

Where defendant was on trial for conspiracy under § 5440, Rev. Stat., an objection to a juror on the ground that he was a salaried official of the United States held in this case to reach to the qualifications of the juror by reason of his relations with the Government although he was not a salaried officer thereof. *Ib.*

4. *Employé of United States incompetent as juror in prosecution by Government.*

An employé of the United States is not competent as a juror where defendant is on trial for conspiracy against the United States under § 5440, Rev. Stat. *Ib.*

5. *Bias implied from relation of employer and employé.*

Bias disqualifies a juror, and bias is implied in the relation between employer and employé and actual evidence thereof is unnecessary. *Ib.*

6. *Exclusion of negroes—Ground for presumption of discrimination.*

Discrimination against the accused in the selection of the grand or petit jury cannot be presumed from the mere fact that none of the jurors were negroes or of African descent, and if it appears that a negro was on the grand jury finding the indictment and negroes were on the venire from which the trial jury was drawn, discrimination will not be presumed. *Thomas* v. *Texas*, 278.

See JURISDICTION, A 5;
VERDICT, 3, 4.

JURY TRIAL.

See IMMIGRATION.

LAND DEPARTMENT.

See PUBLIC LANDS, 2.

LAND REGISTRATION.

See APPEAL AND ERROR, 1.

LEGISLATION.

See COURTS, 1, 16.

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LEGISLATIVE FUNCTIONS.

See JUDICIAL AND LEGISLATIVE FUNCTIONS; RATE REGULATION, 20.

LIBEL IN ADMIRALTY.

See ADMIRALTY.

LIENS.

See LOCAL LAW (ARIZ.).

LIS PENDENS.

Application.
The doctrine of *lis pendens* has no application to commercial securities. (*Orleans* v. *Platt*, 99 U. S. 676, 682.) *Presidio County* v. *Noel-Young Bond Co.*, 58.

LOCAL LAW.

Arizona. Lien of judgment. Under the laws of Arizona, in force at the time, real property upon which a judgment was a lien included mining claims. *Bradford* v. *Morrison*, 389.

Arkansas. Anti-trust law (see Constitutional Law, 11). *Hammond Packing Co.* v. *Arkansas*, 322.

District of Columbia. Common law in force. The common law in force in Maryland on February 27, 1801, remains in force in the District of Columbia except as inconsistent with statutes subsequently enacted. *Crawford* v. *United States*, 183.
Qualifications of jurors. Code, §§ 215, 217 (see Jury and Jurors, 1). *Ib.*

Hawaii. Conveyance by disseisee. In Hawaii a disseisee may convey to a stranger, and a deed purporting to remise, release and forever quit claim amounts to a conveyance of all the grantor's interest in the property at the time. *Spreckels* v. *Brown*, 208.

Indiana. Employers' Liability Act (see Jurisdiction, A 32). *Pittsburg &c. Ry. Co.* v. *Lightheiser*, 560.

Kansas. Power of cities of second class to grant exclusive franchises. Water, Light & Gas Co. v. *Hutchinson*, 207 U. S. 385, in which it was held that an exclusive franchise cannot, under the statutes of Kansas, be granted by ordinance by a city of the second class, followed. *Water, Light & Gas Co.* v. *Hutchinson*, 555.

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Kentucky. Constitution, §§ 213, 214. Carriers (see Constitutional Law, 7). *Louisville &c. R. R. Co.* v. *Stock Yards Co.*, 132.

Oklahoma. Oil inspection law (see Statutes, A 5). *Waters-Pierce Oil Co.* v. *Deselms*, 159.

Philippine Islands. Acts 496 and 926 of Philippine Commission relative to registration of land titles (see Philippine Islands, 3). *Cariño* v. *Insular Government*, 449.

Texas. Anti-trust laws (see Constitutional Law, 4, 5). *Waters-Pierce Oil Co.* v. *Texas*, 86.

Washington. Tax proceedings (see Constitutional Law, 10). *Ontario Land Co.* v. *Yordy*, 152.

MANDAMUS.

1. *Leave to file petition for mandamus to compel Circuit Court to retain jurisdiction of a condemnation proceeding as to parties whose interest was less than the jurisdictional amount, refused.* Matter of Chesapeake & Ohio Ry. Co., 554.

2. *Leave to file petition for mandamus to direct suit against a corporation incorporated under act of Congress to be remanded to the state court, refused.* In re Jones, 561.

3. *Leave to file petition for mandamus to Circuit Court of Appeals to compel reinstatement of appeal from Circuit Court, denied.* In re Dowagiac Mfg. Co., 569.

MARITIME LAW.

1. *Liability of vessels in collision—Apportionment of liability.*
Where two tugs and two scows in tow of one of the tugs are all in fault for a collision, each of the four vessels is liable for an equal share of the damages, and the liability is to be so apportioned even if more than one of the vessels are owned by the same person. *The Eugene F. Moran*, 466.

2. *Liability of tug and tow for damages caused by tug.*
Sturgis v. *Boyer*, 24 How. 110, followed to the effect that a tug having control of a vessel in tow is solely responsible for damages to the other vessel caused by the tug alone. *Ib.*

3. *Flotilla as a unit.*
The fact that vessels are tied together in a flotilla does not make the flotilla a unit in proceedings *in rem*. *Ib.*

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4. *Apportionment of damages in proceeding in rem.*
In a proceeding *in rem* where several vessels are found in fault each bears its share regardless of ownership, and notwithstanding this rule results in charging one who owns more than one of the vessels with a larger proportion than he would be charged in a personal suit against himself and the owners of the other vessels. *Ib.*

See ADMIRALTY;
CARRIERS, 3, 4, 5.

MASTER AND SERVANT.

1. *Transfer of servant to third party so as to make latter liable for his acts.*
One in the general service of another may be so transferred to the service of a third person as to become the latter's servant with all the legal consequences of the new relation; but to change the relation and relieve the master requires more than the mere fact that the servant is sent to do work pointed out by such third party who has made a bargain with the master for his services. *Standard Oil Co.* v. *Anderson*, 215.

2. *Status of winchman employed by one furnishing hoisting power to master stevedore.*
A winchman employed by the person furnishing the hoisting power to a master stevedore for loading a vessel, held to remain that person's servant notwithstanding the hoisting signals were given by the stevedore's foreman and not to be a fellow servant of an employé of the stevedore who was injured by his negligence. *Ib.*

3. *Fellow servants on railroad; who are.*
The engineer of a train, and the section foreman, are fellow servants of a section hand, and the latter cannot recover against the employer for an injury occurring through the negligence of either of the former. *Northern Pacific Railroad* v. *Egeland*, 163 U. S. 93, distinguished. *Texas & Pacific Ry. Co.* v. *Bourman*, 536.

See JURY AND JURORS, 2, 3.

MEASURE OF DAMAGES.

See CONTRACTS, 3;
VERDICT, 2.

MINES AND MINING.

1. *Title of locator; power of disposition.*
The title of a locator to a mining claim located under § 2322, Rev. Stat., is not only property, but property which, in addition to being sold, transferred and mortgaged, is also capable of being inherited with-

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out infringing the title of the United States. *Bradford* v. *Morrison*, 389.

2. *Forfeiture of title acquired by sale under lien of judgment.*
Title to a mining claim acquired by sale under lien of judgment is subject to forfeiture if conditions subsequent, such as the doing of necessary work, are not performed. *Ib.*

3. *Dower right in claim.*
Black v. *Elkhorn*, 163 U. S. 445, holding that widow's dower did not attach to the mining claim involved in that case, distinguished. *Ib.*
See LOCAL LAW (ARIZ.).

MISJOINDER OF PARTIES.
See INTERSTATE COMMERCE, 8.

MISTAKE OF LAW.
See COURTS, 17;
JUDGMENTS AND DECREES, 1.

MITIGATION OF SENTENCE.
See COURTS-MARTIAL, 2.

MONOPOLIES.
See ANTI-TRUST ACT.

MUNICIPAL CORPORATIONS.
See LOCAL LAW (KAN.).

NAVIGABLE WATERS.
1. *Power of State over navigable streams wholly within its boundaries.*
A State, in the absence of any statute by Congress, has plenary power in regard to navigable streams wholly within its boundaries; and obstructions in such streams, in the absence of statute, constitute no offense against the United States, and whether obstructions are unlawful under state law is not a Federal question. (*Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1.) *North Shore Boom Co.* v. *Nicomen Boom Co.*, 406.

2. *Jurisdiction of state and National governments over erection of obstructions.*
Where a Federal law is applicable requiring consent of the Federal Government there is concurrent or joint jurisdiction of the state and National governments over the erection of structures obstructing navigation of a navigable stream wholly within a State.

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(*Cummings* v. *Chicago*, 188 U. S. 410; *Montgomery* v. *Portland*, 190 U. S. 89.) *Ib.*

See JURISDICTION, A 3.

NAVY.

See COURTS-MARTIAL, 1.

NEGLIGENCE.

See ADMIRALTY;
MARITIME LAW;
MASTER AND SERVANT.

NEGROES.

See JURISDICTION, A 5;
JURY AND JURORS, 6.

NEW TRIAL.

Power of this court to grant, on ground of excessive damages.

Held, in a case on error to the Supreme Court of the Territory of Oklahoma, that this court does not possess the power to grant a new trial solely on the ground that the jury awarded excessive damages. *Waters-Pierce Oil Co.* v. *Deselms*, 159.

See VERDICT, 3, 4.

NOTICE.

See CONSTITUTIONAL LAW, 9, 10;
JUDICIAL NOTICE.

OBSTRUCTIONS IN NAVIGABLE WATERS.

See JURISDICTION, A 3;
NAVIGABLE WATERS, 1, 2.

OFFICE.

See PUBLIC OFFICERS, 1.

OREGON.

See STATES, 3, 5.

PARTIES.

See INTERSTATE COMMERCE, 8;
REMOVAL OF CAUSES, 1, 2.

PASS.

See INTERSTATE COMMERCE, 3.

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PATENT APPEALS.
See JURISDICTION, A 22, 23, 24.

PATENTS AND TRADE-MARKS.
See JURISDICTION, A 22, 23, 24.

PATENT FOR LAND.
See PUBLIC LANDS, 2.

PENALTIES AND FORFEITURES.
See CONSTITUTIONAL LAW, 19;
COURTS, 7;
MINES AND MINING, 2.

PERIL OF THE SEA.
See CARRIERS, 4, 5.

PHILIPPINE ISLANDS.

1. *Real property; title by prescription; effect of Treaty of Paris.*
Title by prescription against the crown existed under Spanish law in force in the Philippine Islands prior to their acquisition by the United States, and one occupying land in the Province of Benguet for more than fifty years before the Treaty of Paris is entitled to the continued possession thereof. *Cariño* v. *Insular Government*, 449.

2. *Property rights of inhabitants—Deprivation of land by act of Philippine Commission.*
The acquisition of the Philippines was not for the purpose of acquiring the lands occupied by the inhabitants, and under the Organic Act of July 1, 1902, c. 1369, 32 Stat. 691, providing that property rights are to be administered for the benefit of the inhabitants, one who actually owned land for many years cannot be deprived of it for failure to comply with certain ceremonies prescribed either by the acts of the Philippine Commission or by Spanish law. *Ib.*

3. *Registration of land titles; who entitled.*
Although a province may be excepted from the operation of act No. 926 of 1903 of the Philippine Commission which provides for the registration and perfecting of new titles, one who actually owns property in such province is entitled to registration under act No. 496 of 1902, which applies to the whole archipelago. *Ib.*

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4. *Organic Act as bill of rights.*
The Organic Act of the Philippines made a bill of rights embodying safeguards of the Constitution, and, like the Constitution, extends those safeguards to all. *Ib.*

5. *Writ of error to review judgment of Supreme Court of Philippine Islands dismissed for want of jurisdiction.* Enriquez *v.* Watson & Co., 557.

See APPEAL AND ERROR, 1.

PLEADING.

See CARRIERS, 2;
VENDOR AND VENDEE, 3.

POLICE POWER.

See COURTS, 7;
STATES, 9.

PORTO RICO.

See JURISDICTION, A 26.

POWERS OF CONGRESS.

See CONGRESS, POWERS OF.

PRACTICE AND PROCEDURE.

1. *When bill of exceptions not necessary.*
A bill of exceptions is not necessary when it adds nothing to the record. (*C. H. Nichols Lumber Co.* v. *Franson*, 203 U. S. 278.) *F. L. Grant Shoe Co.* v. *Laird*, 445.

2. *Raising of Federal question on petition for rehearing.*
An attempt to raise the Federal question in the petition for rehearing in the highest court of the State will not avail if the petition is overruled without specifically passing on the questions. *Waters-Pierce Oil Co.* v. *Texas* (*No.* 2), 112.

3. *Scope of review of judgment of state court—Bringing in new matter by assignments of error.*
The review of a judgment of a state court is confined to assignments of error made and passed upon in the judgment brought here for review; assignments of errors in this court cannot bring new matter into the record. *Ib.*

4. *Following findings of fact.*
This court does not review, but accepts as conclusive the findings of

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facts made by the state court. *Waters-Pierce Oil Co.* v. *Texas* (*No.* 1), 86.

5. *Findings of master in chancery; when not conclusive.*
In ordinary equity suits findings of the master and the court below are conclusive here unless unsupported by the evidence or made under erroneous views of law; but where the constitutionality of a legislative act is involved, this court, from the respect due to legislative authority, will not regard such findings as conclusive. *Knoxville* v. *Knoxville Water Co.*, 1.

6. *Controlling effect on this court of decisions of state courts.*
When this court is called upon to exercise its own judgment, it will not be controlled by decisions of state courts. *Matter of Dunn*, 374.

7. *Certified question calling for decision of whole case, not answered.*
Where a certified question does not propound a distinct issue of law, but in effect calls for a decision of the whole case, this court need not, and in this case does not, answer it. (*Chicago, B. & Q. R. R.* v. *Williams*, 205 U. S. 444.) *The Folmina*, 354.

8. *Certified question not presenting distinct issue of law, not answered.*
The question "whether the ship is relieved from liability in consequence of said exception," not presenting a distinct issue of law, not answered. *Ib.*

9. *Determination of effect of grant of concurrent jurisdiction.*
In determining the effect of a grant of concurrent jurisdiction this court confines itself to the precise questions presented. *Nielsen* v. *Oregon*, 315.

10. *Determination from record as to existence of fraud, connivance or consent in respect of judgment rendered.*
Where the state court has sustained a demurrer to an answer which set forth a complete defense in the absence of fraud, connivance or consent on defendant's part, this court will determine for itself from the record whether the record shows any fraud, connivance or consent. *American Express Co.* v. *Mullins*, 311.

11. *Presumption as to sufficiency of reasons for refusal of lower court to grant new trial.*
Where the reasons of the Supreme Court of the Philippine Islands for refusing to grant a new trial on ground of newly discovered evidence do not appear, their sufficiency must be presumed and the question is not open in this court. *Santos* v. *Roman Catholic Church*, 463.

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12. *When judgment reversed for defects in indictment.*
An indictment which definitely sets forth the elements of the offense of which it was intended to charge the accused is sufficient; and in this court only substantial defects in the indictment are available to reverse a judgment of conviction. (*Connors* v. *United States*, 158 U. S. 408.) *New York Central R. R.* v. *United States*, 500.

13. *Scope of review on error to Supreme Court of Philippine Islands.*
A finding by the Supreme Court of the Philippine Islands that the parties sued as defendants do not constitute a judicial entity such as a *cofradia*, is not open to reëxamination in this court. *Santos* v. *Roman Catholic Church*, 463.

See ANTI-TRUST ACT, 2; COURTS, 2; CRIMINAL LAW, 1; INSTRUCTIONS TO JURY, 2; JURISDICTION, A 22; RATE REGULATION, 14, 19.

PREFERENCES.

See DEBTS DUE UNITED STATES.

PRESCRIPTION.

See PHILIPPINE ISLANDS, 1.

PRESIDENT OF THE UNITED STATES.

See COURTS-MARTIAL, 2.

PRESUMPTIONS.

See ATTORNEY AND CLIENT; BONDS, 2; EVIDENCE, 2; JURY AND JURORS, 5, 6; PRACTICE AND PROCEDURE, 11; PROPERTY RIGHTS, 2.

PRINCIPAL AND AGENT.

See ATTORNEY AND CLIENT; CORPORATIONS, 2, 3, 4, 5; INTERSTATE COMMERCE, 5, 8.

PRINCIPAL AND SURETY.

See DEBTS DUE UNITED STATES.

PRIORITY.

See DEBTS DUE UNITED STATES.

PRIVILEGES AND IMMUNITIES.

See JUDICIAL AND LEGISLATIVE FUNCTIONS.

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PROCESS.

See APPEAL AND ERROR, 1;
CARRIERS, 1, 2;
EXECUTIVE POWERS.

PRODUCTION OF BOOKS AND PAPERS.

See CONSTITUTIONAL LAW, 11, 12, 13, 14, 18, 24.

PROPERTY RIGHTS.

1. *Fiction as ground for deprivation of.*

Fiction, not being a satisfactory ground for taking one man's property to satisfy another man's wrong, should not be extended. *The Eugene F. Moran*, 466.

2. *Presumption of, as against deprivation through governmental regulation.*

Every presumption of ownership is in favor of one actually occupying land for many years, and against the Government which seeks to deprive him of it, for failure to comply with provisions of a subsequently enacted registration act. *Cariño* v. *Insular Government*, 449.

See CONSTITUTIONAL LAW, 23; PHILIPPINE ISLANDS, 1, 2;
MINES AND MINING, 1; RATE REGULATION, 6, 7;
TITLE.

PROVABLE CLAIMS IN BANKRUPTCY.

See BANKRUPTCY.

PROVISOS.

See STATUTES, A 3.

PROXIMATE CAUSE.

See VENDOR AND VENDEE, 2.

PUBLICATION.

See INTERSTATE COMMERCE, 4.

PUBLIC LANDS.

1. *Effect of decision of Secretary of the Interior to bind his successor and the courts.*

When the Secretary of the Interior has jurisdiction of a land contest and grants a rehearing he is not, nor is this court, bound by the facts found by his predecessor on the original hearing, *Potter* v. *Hall*, 189 U. S. 292; after such a rehearing and when, as in this

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case, new testimony is allowed, the decision then made is the ultimate action of the department. *Greenameyer* v. *Coate*, 434.

2. *Fraud of holder of patent to justify declaring him to hold as trustee for another.*

The holder of a patent obtained by error of law of, or fraud or imposition on, the Land Department, may be declared to hold the same as trustee for another; but the fraud must have been so practiced as to have prevented the unsuccessful party from fully exhibiting his case, and if the case has been fully considered the decision of the proper officers is in the nature of a judicial determination. (*Vance* v. *Burbank*, 101 U. S. 514.) *Ib.*

PUBLIC OFFICERS.

1. *Office not a protection from personal liability.*

An officer of a State interfering with an individual's rights in an unconstitutional manner derives no protection from personal liability on account of his office. *Moyer* v. *Peabody*, 78.

2. *Governor of State; effect of declaration by.*

The declaration of the governor of a State that a state of insurrection exists is conclusive. *Ib.*

3. *Governor of State; personal liability for acts done under authority of constitution and laws of State.*

Where the constitution and laws of a State give the governor power to suppress insurrection by the National Guard, as is the case in Colorado, he may also seize and imprison those resisting, and is the final judge of the necessity for such action; and when such an arrest is made in good faith he cannot be subjected to an action therefor after he is out of office on the ground that he had not reasonable cause. *Ib.*

See CRIMINAL LAW, 2, 3;
JURY AND JURORS, 3, 4;
PUBLIC LANDS, 1.

PUBLIC SERVICE CORPORATIONS.

See RATE REGULATION.

QUALIFICATIONS OF JURORS.

See JURY AND JURORS.

RAILROADS.

See CARRIERS;
MASTER AND SERVANT, 3.

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RATES.

See INTERSTATE COMMERCE, 1, 2, 4.

RATE REGULATION.

1. *Public service corporations; what to be considered in determining reasonableness of rate.*

In estimating for rate-fixing purposes the value of a plant, cost of reproduction is not a fair measure of value unless a substantial allowance is made for depreciation. *Quære*, whether anything can be allowed in the case of the plant of a public service corporation for "going concern" above the value of the separate tangible elements. *Knoxville* v. *Knoxville Water Co.*, 1.

2. *Same.*

In valuing for rate-fixing the plant of a public service corporation, bonds and stocks issued for its purchase and construction in excess of its cost and by and to parties interested in and controlling the company, afford neither measure nor guide. *Ib.*

3. *Same.*

In determining whether a rate affords a fair return the amount must be considered as fixed by the ordinance and not as voluntarily reduced by the corporation, even if such reduction be in accordance with custom and for the purpose of obtaining prompt payment. *Ib.*

4. *Same.*

In determining whether a rate is confiscatory the court is not confined to evidence as to the income of the corporation affected for the fiscal year during, or preceding that in, which the rate was fixed; it may receive evidence as to such income in subsequent years. *Ib.*

5. *Same.*

A sufficient amount should be allowed from the earnings of a public service corporation for making good depreciation of plant and replacing deteriorated portions thereof; but amounts so expended cannot be considered as additional to the original cost in valuing the plant for purposes of ascertaining whether a rate is confiscatory. *Ib.*

6. *Quære as to constitutionality of regulation in respect of due process of law and just compensation.*

Quære, and not decided, whether, under the circumstances of this case, an ordinance fixing a rate yielding a return of four per cent after allowing two per cent for depreciation is confiscatory, and amounts to a deprivation of property without due process of law or a taking of property without compensation. *Ib.*

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7. *Public service corporations; franchises as element for fixing rates.*
Franchises of public service corporations are property and cannot be taken or used by others without compensation, and, where a State has by legislative enactment permitted such corporations to capitalize such franchises, their value at the time of such capitalization should be included in the value of the property as an element for fixing rates; but no increased value of such franchises should be allowed. *Willcox* v. *Consolidated Gas Co.*, 19.

8. *Public service corporations; return to which entitled.*
Public service corporations, such as gas companies, are subject to the legislative right to fix rates which permit not more than a fair return on the property used. *Ib.*

9. *When rate confiscatory.*
Whether a rate yields such a fair return as not to be confiscatory depends upon circumstances, locality and risk, and no particular rate can be established for all cases. *Ib.*

10. *When rate not confiscatory.*
Under all the circumstances of this case this court concurs with the court below that six per cent is a fair return on the value of property employed in supplying gas in the city of New York, and a rate yielding that return is not confiscatory. *Ib.*

11. *Estimating value of franchises.*
In estimating value of franchises for the purpose of fixing rates, it is immaterial that the corporation is taxed on a greater value than that allowed if it charges its taxes as operating expenses in determining net income. *Ib.*

12. *Good-will as element of value of property.*
Where a public service corporation has a monopoly, such as of supplying gas in a large city, "good-will" cannot be considered as an element of value of the property employed. *Ib.*

13. *Time as of which property valued.*
For purpose of fixing rates the value of property employed should be determined as of the time when the inquiry is made, and, as a general rule, the corporation is entitled to the benefit of increased value since acquisition. *Ib.*

14. *Practice where complainant in bill to enjoin enforcement of rate fails to show that it is confiscatory.*
Where, as in this case, in an action brought before the rate takes effect, complainant fails to sustain the burden of clearly showing that a rate act is confiscatory, the bill should be dismissed without preju-

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dice to right of the complainant to bring another action after the rate goes into effect if it then proves to be confiscatory. *Ib.*

15. *Right to assert, in Circuit Court of United States, that rates unreasonable—Burden of proof of unreasonableness.*

Where diverse citizenship exists complainant may assert in a suit in the Circuit Court of the United States that rates fixed by ordinance are so low as to be confiscatory under the Fourteenth Amendment or unreasonable or unjust under the provisions of state law. Rates fixed by the body having jurisdiction, after investigation based on reports of the corporation rendering the service, are *prima facie* fair and valid and the burden of proof is on the complainant attacking them to show that they are confiscatory or unreasonable. *Louisiana R. R. Comm.* v. *Cumberland Tel. Co.*, 414.

16. *Confiscatory rates—Considerations in determining reasonableness of rates—Burden of proof.*

Where a public service corporation raises more money in a particular year than required for actual depreciation it cannot carry the excess to capital for the purpose of estimating the amount on which it is entitled to pay dividends in determining whether a rate is unconstitutional as confiscatory, and the onus of showing that this has not been done is on complainant where the books show that such an excess has been collected. *Ib.*

17. *Same.*

Quære, and not decided, whether it would be entitled to dividends on such excess if invested in extensions and additions. *Ib.*

18. *Confiscatory rates—Rule as to increasea profits from decreased rates not applicable to telephone companies.*

While in some businesses where increased demand does not involve a corresponding increase in expense, increased profits may result from decreased rates, this rule does not apply to a business, such as that of a telephone company, where expenses are proportionately increased with increased demand and service. *Ib.*

19. *Confiscatory rates—Practice in this court where actual effect of rates ascertainable.*

Although complainant failed to prove its case, the bill will not be dismissed but a new trial ordered, as the rates have been in force and the inquiry can be founded upon their actual effect. *Ib.*

20. *Rate-making a legislative function.*

Rate-making is a legislative function whether exercised by the legis-

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lature or by a subordinate body to which power has been delegated, such as a municipality. *Knoxville* v. *Knoxville Water Co.*, 1.

See CONSTITUTIONAL LAW, 20, 21;
CORPORATIONS, 4;
COURTS, 2, 4, 5, 6.

REAL PROPERTY.

See LOCAL LAW (ARIZ.) (HAW.);
PHILIPPINE ISLANDS, 1, 2, 3;
PROPERTY RIGHTS, 2.

REBATES.

See INTERSTATE COMMERCE, 9, 10, 11, 12, 13.

RECEIVERS.

Liability for costs and expenses of receiver erroneously appointed.

Under the circumstances of this case it is not proper to charge the costs and expenses of the receiver erroneously appointed by the Federal court on complainant, but those expenses should be paid from the fund. *Palmer* v. *Texas*, 118.

See CONSTITUTIONAL LAW, 6;
COURTS, 10, 12;
DEBTS DUE UNITED STATES;
INTERSTATE COMMERCE, 14.

RECORD.

See PRACTICE AND PROCEDURE, 1.

REGISTRATION OF LAND TITLES.

See PHILIPPINE ISLANDS, 3.

REMOVAL OF CAUSES.

1. *Diversity of citizenship for purposes of—Arrangement of parties so as to create diversity of citizenship.*

In this case, *held* that in an action to foreclose, where the junior encumbrancer as plaintiff joined the senior encumbrancer as a defendant and attacked the validity of his lien, as did the owner of the property, also a defendant, a separable controversy existed between the senior encumbrancer on the one side and the owner and the junior encumbrancer on the other side, which was removable, as diverse citizenship existed when the parties were so arranged; and such removal could not be prevented either by the unnecessary joinder of the senior encumbrancer, or because prior to the filing of the reply showing the separable nature of the controversy a remanding order had been made. *Fritzlen* v. *Boatmen's Bank*, 364.

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2. *Effect of joinder of other defendants, citizens of plaintiff's State, on right of Federal corporation defendant to remove.*

Where the Circuit Court has jurisdiction by reason of the fact that the defendant is a corporation created by an act of Congress, the joinder of other defendants, citizens of plaintiff's State does not prevent removal to the Circuit Court if there is no separable controversy and all the defendants unite in the petition: the Federal character permeates the entire case and affects all parties defendant. *Matter of Dunn*, 374.

3. *Right of resort to Federal court in first instance as prerequisite of right to remove.*

The right to remove depends upon whether the suit could have been brought originally in the Circuit Court of the United States. (*Cochran* v. *Montgomery County*, 199 U. S. 260.) *Ib.*

4. *When suit removable as one arising under Constitution and laws of United States.*

As a corporation created by act of Congress derives all its rights from the law creating it, suits brought against it, on account of its action, arise under the Constitution and laws of the United States and are removable into the Federal court. (*Osborn* v. *Bank of United States*, 9 Wheat. 738.) *Ib.*

5. *Effect of order to remand on right to make second application to remove.*

If, after an order to remand has been made, it results, from the subsequent pleadings or conduct of the parties, that the cause is removable, a second application to remove can be made, and the right to make it is not controlled by the previous remanding order; nor is the granting of the order to remove under such circumstances a refusal to give effect to such previous order to remand. *Fritzlen* v. *Boatmen's Bank*, 364.

6. *Timeliness of application for.*

Powers v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, followed as to when an application for removal is made in time. *Ib.*

See ACTIONS, 2;
MANDAMUS, 2.

REPEALS BY IMPLICATION.

See STATUTES, A 7, 8.

RES JUDICATA.

See BONDS, 4.

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RETROACTIVE LAWS.
See CRIMINAL LAW, 6.

RIPARIAN RIGHTS.
See DEEDS, 1.

RIVERS.
See STATES, 3, 4, 5, 6.

RIVER AND HARBOR ACTS.
See JURISDICTION, A 3.

ROMAN CATHOLIC CHURCH.
See TITLE.

SALES.
See ANTI-TRUST ACT;
CONTRACTS, 3;
VENDOR AND VENDEE, 3.

SEARCHES AND SEIZURES.
See CONSTITUTIONAL LAW, 24, 25.

SECRETARY OF THE INTERIOR.
See PUBLIC LANDS, 1.

SENTENCE.
See COURTS-MARTIAL.

SETTING ASIDE VERDICT.
See VERDICT, 3, 4.

SHIPPING.
See ADMIRALTY;
CARRIERS, 3, 4, 5;
MARITIME LAW.

SOVEREIGNTY.
Definition—Relations of subject to former sovereign.
While, in legal theory and as against foreign nations, sovereignty is absolute, practically it is a question of strength and of varying degree; and it is for a new sovereign to decide how far it will insist

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upon theoretical relations of the subject to the former sovereign and how far it will recognize actual facts. *Cariño* v. *Insular Government*, 449.

SPAIN.

See WAR, 1.

STATES.

1. *Jurisdiction to punish violation of anti-trust law where agreement made out of State.*

Although an agreement to violate the anti-trust law of a State may be made outside of the State, if the parties thereto or their agents execute it, or attempt so to do, within the State, they are under the jurisdiction of the State and their conviction for such acts is not without due process of law. *Waters-Pierce Oil Co.* v. *Texas* (*No.* 1), 86.

2. *Power to prevent unlawful combinations in restraint of trade.*

States having power to prevent unlawful combinations in restraint of trade may provide the procedure for enforcing the same, subject only to the qualification that such procedure must not deny or conflict with fundamental or constitutional rights. *Ib.*

3. *Jurisdiction of Oregon and Washington over Columbia River.*

The concurrent jurisdiction given by Congress to the States of Oregon and Washington over the Columbia River, by the acts of March 2, 1853, c. 90, 10 Stat. 172, and of February 14, 1859, c. 33, 11 Stat. 383, extends to civil as well as criminal matters, and is broadly a grant of jurisdiction to each State. (*Wedding* v. *Meyler*, 192 U. S. 573.) *Nielsen* v. *Oregon*, 315.

4. *Concurrent jurisdiction—Right of State first acquiring jurisdiction—Finality of judgment rendered.*

Where two States have concurrent jurisdiction, the one first acquiring jurisdiction may prosecute and punish for an act which is *malum in se* and punishable by the laws of both States, and the judgment is a finality so that the person prosecuted cannot be again tried in either State. But this rule does not apply to those acts which are prohibited in only one of the States. *Ib.*

5. *Concurrent jurisdiction—Right of one State to prosecute for act malum prohibitum by its laws, but permitted in territory of other State wherein the act authorized.*

Where two States have concurrent jurisdiction over the same territory which is partly located in one State and partly in the other, one State cannot prosecute a person for an act *malum prohibitum* by

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its own laws, and which was committed in territory within the other State by authority of the latter; and so held, that one holding a purse net license from the State of Washington cannot be prosecuted for using such net on the Washington side of the Columbia River in the courts of Oregon for violating the statutes of that State prohibiting the use of such nets. *Ib.*

6. *Concurrent jurisdiction; prosecutions in case of.*
Quære, whether such person could be prosecuted in the courts of Oregon for using such nets on the Oregon side of the river; and *quære* whether, where concurrent jurisdiction exists, prosecutions should be in the name of both States. *Ib.*

7. *Power to exclude foreign corporations.*
The right of a State to prevent foreign corporations from continuing to do business within its borders, is the correlative of its right to exclude them therefrom; and, as this power is plenary, the State, so long as no contract is impaired, may exert it from consideration of acts done in another jurisdiction. *Hammond Packing Co.* v. *Arkansas*, 322.

8. *Materiality of question of motive in exercise of power to revoke permit granted foreign corporation.*
If the power exists to revoke a permit, the question of motive is immaterial for the purpose of determining the constitutionality of the legislative action exerting the power. *Ib.*

9. *Police power; effect of chartered rights of corporation on.*
The chartered right of a corporation to do business does not operate to deprive the State of its police power, and the franchise to do business is qualified by the duty to do so conformably to lawful and proper police regulations thereafter enacted. *Ib.*

See CONSTITUTIONAL LAW, 6, 15, 18, 24; COURTS, 7; INTERSTATE COMMERCE, 14; JURISDICTION, A 3; NAVIGABLE WATERS, 1, 2; PUBLIC OFFICERS.

STATUTES.

A. CONSTRUCTION OF.

1. *Constitutionality maintained if possible.*
Every statute is to be construed so as to maintain its constitutionality if possible. *New York Central R. R.* v. *United States*, 481.

2. *Criminal statutes; rule of construction.*
While criminal statutes are not to be enlarged by construction, and a

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crime must be clearly defined in its terms, they are to be reasonably construed with a view to effecting the purpose of their enactment. *United States* v. *New York Central R. R. Co.*, 509.

3. *Provisos; rule of construction of.*
While a proviso may sometimes be construed as extending rather than limiting legislation each statute must depend on its own terms, and a proviso will be construed consistently with the legislation under consideration. *American Express Co.* v. *United States*, 522.

4. *Superfluous negative may be omitted.*
In the construction of a statute a superfluous negative may be omitted where the meaning is apparent, as in this case. *Waters-Pierce Oil Co.* v. *Deselms*, 159.

5. *Separable provisions—Oklahoma Oil Inspection Law; provisions as to punishment.*
Provisions for unequal punishment of corporations and individuals for violations of the same statute, *held*, in regard to the Oklahoma Territory Oil Inspection Law, to be separable, and, even if unconstitutional, not to affect the prohibitions contained in the statute against the use of oil not conforming to the standards fixed thereby. *Ib.*

6. *Separability of provisions.*
Provisions in a gas rate bill for rate, pressure and penalties for violation, may be, as held in this case, separable and the unconstitutionality of the provisions as to pressure and penalties will not affect the provisions as to rate. *Willcox* v. *Consolidated Gas Co.*, 19.

7. *Repeals by implication—Right to appeal or writ of error.*
Where a statute provides for an appeal or a writ of error to a specific court it must be regarded as a repeal of any previous statute providing for an appeal or a writ of error to another court. (*Brown* v. *United States*, 171 U. S. 631.) *Laurel Oil Co.* v. *Morrison*, 291.

8. *Repeal or modification of statute by subsequent legislation.*
Quære, and not decided, whether the act of March 3, 1887, c. 359, 24 Stat. 505, supersedes or modifies § 1066, Rev. Stat., and § 9 of the act of March 3, 1863, c. 92, 12 Stat. 767, relating to claims against the United States growing out of, or dependent on, treaty stipulations. *Juragua Iron Co.* v. *United States*, 297.

See CONSTITUTIONAL LAW, 16;
INTERSTATE COMMERCE, 7;
JURISDICTION, A.

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B. STATUTES OF THE UNITED STATES.
See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.
See LOCAL LAW.

STOCKHOLDERS.
See CORPORATIONS, 6.

SUBROGATION.
See DEBTS DUE UNITED STATES.

SUITS AGAINST UNITED STATES.
See ACTIONS, 1.

TARIFF ACT.
See JURISDICTION, A 9.

TARIFF OF RATES.
See INTERSTATE COMMERCE, 4.

TAX SALES.
See CONSTITUTIONAL LAW, 9, 10.

TAXES AND TAXATION.
See CONSTITUTIONAL LAW, 9, 10;
JURISDICTION, A 2.

TELEPHONE COMPANIES.
See RATE REGULATION, 18.

TITLE.
Capacity of Roman Catholic Church to hold property in insular possessions. The Roman Catholic Church has a legal personality and the capacity to hold property in the insular possessions of the United States, and this right is not affected by the fact that the property was acquired by gift or from the public funds. (*Ponce* v. *Roman Catholic Church*, 210 U. S. 296.) *Santos* v. *Roman Catholic Church*, 463.
See MINES AND MINING, 1, 2;
PHILIPPINE ISLANDS, 1, 3;
PROPERTY RIGHTS, 2.

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TORTS.

Liability of one for tort of third person where observance of duty might have prevented the tort.

When a duty is imposed for the purpose of preventing a certain consequence its breach not leading to that consequence does not make a defendant liable for the tort of a third person merely because the observance of the duty might have prevented that tort. *The Eugene F. Moran*, 466.

See CORPORATIONS, 2;
VENDOR AND VENDEE, 1;
WAR, 2.

TRADE-MARK PROCEEDINGS.

See JURISDICTION, A 22.

TREATY OF PARIS.

See JURISDICTION, A 26.

TRIAL.

See CRIMINAL LAW, 1.

TRIAL BY JURY.

See IMMIGRATION.

TRUSTS AND TRUSTEES.

See PUBLIC LANDS, 2.

TUCKER ACT.

See ACTIONS, 1.

UNITED STATES.

See ACTIONS, 1;
MINES AND MINING, 1.

UNREASONABLE SEARCHES AND SEIZURES.

See CONSTITUTIONAL LAW, 24, 25.

VENDOR AND VENDEE.

1. *Liability of original vendor to vendee of its vendee for damages produced by reason of unlawful nature of goods sold.*

Where the original vendor knowingly sells, as coal oil, a mixture of coal oil and gasoline, of such inflammable character as to be unlawful

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under the local statute, to a vendee who in ignorance of its unlawful nature sells it to a third party in like ignorance, the original vendor is directly responsible to the final purchaser for the consequences of an explosion, produced solely by reason of such unlawful nature while the oil is being used in a legitimate manner. In such a case the responsibility of the original vendor rests not on contract but in tort. *Waters-Pierce Oil Co.* v. *Deselms*, 159.

2. *Same.*

On the facts in this case, and in view of the ignorance of both vendees in regard thereto, the unlawful character of the articles sold *held* to be the proximate cause of plaintiff's injuries; but *quære*, and undecided, whether the original vendor would have been relieved of responsibility if the first vendee had knowledge of the unlawful character of the article. *Ib.*

3. *Right of vendee to plead combination in restraint of trade in action for goods sold.*

While a voluntary purchaser of goods at stipulated prices under a collateral, independent contract cannot avoid payment merely on the ground that the vendor was an illegal combination, *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, a vendee of goods purchased from an illegal combination in pursuance of an illegal agreement can plead such illegality as a defense. *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 227.

See BONDS, 1, 2;
CONTRACTS, 3;
JURISDICTION, A 1.

VERDICT.

1. *Peremptory instruction for defendant; when justified.*

While the burden on the plaintiff is not satisfied by showing an accident and an injury, where there was adequate proof to show that an explosion occurred which could only have occurred by the unlawful character of articles sold by defendant, a peremptory instruction for defendant is properly refused. *Waters-Pierce Oil Co.* v. *Deselms*, 159.

2. *Estimation of damages for tort; function of jury.*

When the court, at defendant's request, has charged as to the general rules of ascertaining plaintiff's damages, it is not error to add that the amount, as in this case for death of infant children, had not been fixed by the evidence, and that the verdict must be the result of the jury's own judgment. *Ib.*

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3. *Setting aside; possible influence of jury by newspaper articles as ground for.*

Where articles indicating the judge's leanings appear in a newspaper, and one of the parties informs the judge that he need not give any instructions to the jury as to reading the paper, the verdict cannot be set aside because similar articles subsequently appeared in other papers which may have been read by members of the jury. *Spreckels* v. *Brown*, 208.

4. *Setting aside on ground that jury improperly influenced; effect of affidavits by jurymen.*

The admission of affidavits of jurymen to effect that they had not been influenced by newspaper articles held to be immaterial, the order overruling the motion for new trial being right on other grounds. *Ib.*

VESSELS.

See ADMIRALTY; MARITIME LAW; CARRIERS, 3, 4, 5; MASTER AND SERVANT, 2.

WAIVER.

See COURTS-MARTIAL, 1.

WAR.

1. *Enemy country; status of Cuba as, during war with Spain—Citizens of United States as enemies thereof.*

Under the recognized rules of war Cuba, being a part of Spain, was during the war of 1898–9, enemy country; and all persons residing in Cuba pending the war were to be deemed enemies whatever their nationality, including citizens of the United States there domiciled and doing business. *Juragua Iron Co.* v. *United States*, 297.

2. *Right of citizen of United States, whose property in Cuba destroyed by army of United States, to maintain action against latter to recover therefor.*

A citizen of the United States domiciled in Cuba cannot maintain an action against the United States under the act of March 3, 1887, in the Court of Claims for the value of property destroyed during, and as the result of, military operations in Cuba by order of the commanding officer in the field as there is no obligation based on implied contract to compensate for the value of such property. If the order was not justified by the rules of war it would amount to a tort, and the action based thereon would be one sounding in tort, and the action cannot be maintained. *Ib.*

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3. *Enemy property—Rights of citizens of United States domiciled in Cuba during war with Spain.*

Property of citizens of the United States in Cuba was during the war with Spain to be regarded as enemy property subject to the laws of war, and to be destroyed whenever military necessity so demanded; nor could a citizen of the United States invoke the protection of the Constitution pending the war for his property in Cuba any more than could a Spanish subject. *Ib.*

WASHINGTON STATE.

See STATES, 3, 5.

WATERS.

See JURISDICTION, A 3;
NAVIGABLE WATERS;
STATES, 3, 4, 5, 6.

WITNESSES.

See EVIDENCE, 3.

WORDS AND PHRASES.

"About" (see Contracts, 2). *Harten* v. *Löffler*, 397.
"Sea beach" (see Deeds, 1). *Spreckels* v. *Brown*, 208.

WRIT OF ERROR.

See APPEAL AND ERROR;
JURISDICTION.

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